

WE well knowing the great Ability, Learning, Judgment, and Integrity of the Author, do allow and approve of the Printing and Publishing of this Book, entitled, *Reports of Adjudged Cases in the Courts of Chancery, King's Bench, Common Pleas and Exchequer, taken and collected by the Right Honourable Sir JOHN STRANGE, Knight, late Master of the Rolls.*

Hardwicke C.
D. Ryder,
Tho. Clarke,
J. Willes,
T. Parker,
T. Denison,
M. Foster,
E. Clive,
Tho. Birch,
H. Legge,
S. S. Smythe,
Rich^d. Adams,
Hen. Bathurst,
John Eardley Wilmot.

B. E. K.

REPORTS

O F

ADJUDGED CASES

In the COURTS of
CHANCERY, KING'S BENCH,
COMMON PLEAS *and* EXCHEQUER,
FROM
Trinity Term in the second Year of King GEORGE I.
TO
Trinity Term in the twenty-first Year of King GEORGE II.



Taken and Collected by the Right Honourable
Sir JOHN STRANGE, Knt.
Late Master of the Rolls.

In TWO VOLUMES.

Published by his Son, *John Strange* of the *Middle Temple* Esquire.

VOL. I.

In the SAVOY:

Printed by *Henry Lintot*, Law-Printer to the King's Most Excellent Majesty, for
WILLIAM SANDBY at the *Ship* over-against *St. Dunstan's Church, Fleetstreet*.
M.DCC.LV.

8

REPORTS

OF

ADJUDGED CASES

IN THE COURTS OF

CHANCERY, KING'S BENCH,

COMMON PLEAS AND EXCHEQUER,

FROM THE YEAR 1750 TO 1760

BY JAMES HARGREAVES, ESQ. OF THE MIDDLE TEMPLE


MVSEVM
BRITANNICVM


MVSEVM
BRITANNICVM

JOHN STURGEON, ESQ. OF THE MIDDLE TEMPLE

Attorney at Law

Printed by J. G. ALLEN, at the Crown and Anchor, in St. Dunstons Church-yard

LONDON: 1760

Price 10s. 6d.

By the Author, at the Crown and Anchor, in St. Dunstons Church-yard

1760

To the RIGHT HONOURABLE

P H I L I P

EARL of HARDWICKE,

Viscount ROYSTON,

Baron HARDWICKE of Hardwicke
in the County of Gloucester,

Lord HIGH CHANCELLOR
of GREAT BRITAIN,

These Reports are, with the utmost Respect and
Esteem, inscribed by

50 His LORDSHIP'S

Most obedient and obliged

Humble Servant,

John Strange.

Vol. I.

a

4+

P. H. I. I. P.

THE
BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE BANK OF CHARLOTTE
P. R. E. A. C. E.
THE BANK OF CHARLOTTE
P. R. E. A. C. E.

THE PREFACE.

THE profession of the law is already so overburthened with reports, that I think it necessary, that every man who prepares any thing of this kind for the press, should give some very particular reason for his doing so. And my reason is this :

Having during the first years of my attendance at Westminster-hall been pretty diligent and exact in taking and transcribing notes; I soon found, it introduced me to the honour of having them borrowed and transcribed by several of the Judges, and others. By this means they came into the hands of a Gentleman, who had a servant so corrupt, as clandestinely to make several copies, and sell them to persons, who had not the honour to deliver them up, when the villany was detected.

detected. This put me under an apprehension, that I should soon see some of them in print. And as many of them were only arguments in causes never adjudged, and therefore of no use to the publick; I thought it necessary to select these which were actually adjudged, and collect them together, that I might at ever so short a warning have it in my power, by printing a genuine, to suppress any surreptitious edition. With this view I caused my clerk to transcribe such cases, as I thought would be proper; and if no accident happens, that obliges me to publish them in my life, they will remain to be dealt with, as they who come after me shall think fit.

J. Strange.

Trinity

Trinity Term

2 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

John Fortescue Aland, *Esq; Solicitor General.*

Clark *vers.* Elwick.

MR. *Reeve* moved the last term, That one of the witnesses to a submission to arbitration might be obliged to make affidavit thereof, in order to make it a rule of court pursuant to the *stat. 9 & 10 W. 3. c. 15.*

Rule made upon a witness to a submission to arbitration, to make affidavit of the execution.

The Solicitor General insisted, that affidavits are voluntary; but the reason of the witness's refusal in this case was, because the award was unfairly made, and they had no other remedy but this to prevent the submission being made a rule of court. *Sed per Curiam,* The hardship of this particular case will not at all vary our rule, which must be a standing method for the future: The act of parliament has appointed but this single way by affidavit; and we will not suffer a witness to evade it by his refusal. We force a witness to a bond by *subpœna*; and every witness does by his signing undertake

VOL. I.

B

to

to prove it when required. And *Hil. 6 Geo. Singleton v. Bradley*, there was the same rule upon my opposing it.

Rule for the witness to make affidavit of the execution.

Dominus Rex vers. Winteringham.

Male et negligenter se gessit too general in an indictment.

INDICTMENT *quia male et negligenter se gessit in executione of the office of constable*, quashed for being too general.

Bayley vers. Jenners.

A person qualifying himself after listed shall be taken to be doing duty, and discharged upon common bail.

REEVE moved that defendant being a trooper might be discharged upon common bail; it appeared he was listed 16th May, and arrested 19th; and the question was, whether he had ever performed duty; and the affidavit went no further than his learning to ride. The plaintiff insisted, that this is not doing duty as the act requires, but only in order to do duty.

Cur', It is doing duty, he receives his pay, and must be discharged upon common bail.

Dominus Rex vers. Wyndham.

THE defendant Sir *William Wyndham* being brought up by the Lieutenant of the *Tower*, Serjeant *Bengelly*, Mr. *Jefferies*, Mr. *Reeve* and Mr. *Hungerford* moved, that he might be admitted to bail, and offered several arguments to induce the court to bail him, which with the answers given thereto by Sir *Joseph Jekyll*, Mr. Attorney and Solicitor, are comprized in the opinion of the court, which was delivered the last day of the term *ut sequitur*.

Parker C. J. This is a commitment by the secretary of state for high treason generally; it has been moved on behalf of Sir *William Wyndham*, that he might be admitted to bail. I shall take notice of the arguments on both sides, and of the particular circumstances of this case, which have been laid before the court, with as much clearness, as the little time we have had to consider of the matter since it was spoke to, and the extraordinary business of this day, will permit me.

It has been admitted on all hands that the court has a discretionary power in this case; and I think the arguments which have been made use of by the counsel for Sir *William Wyndham* are upon these five points:

1. Exception, That the commitment is, *that he shall be kept safe and close*; it has been insisted, this is more than can be justified by law. This exception is offered without any authority to support it, and is against an infinite number of precedents. But admitting this were a good exception, the consequence would not be that we should discharge Sir *William Wyndham*, but only *quatenus* his being kept close. The *keeping him safe*, is only by way of admonition to the officer, to put him in mind of his duty, and the punishment which he must undergo in case of an escape. The common process which goes to the sheriff, commands him to take the defendant *et eum salvo custod*.

in a commitment is only by way of direction to the officer.

2. Exception has been taken, That the charge is not said to be upon oath; and if a secretary of state might commit people without oath, the whole nation would be their tenants at will. In answer to this, I must observe, as I did before, that the precedents are many of them so, and no authority has been cited in support of the objection. The not mentioning it to be upon oath, is not conclusive, that it was not upon oath. In *Ferguson's* case this exception was over-ruled, *Trin. 2 W. & M.* and it was held in *Kendal's* case, that an imprisonment may be without oath; and also in the House of Lords, that commitments may be without oath. If a man be taken with treasonable papers, he may be committed, and any magistrate may commit *super visum*, without oath.

Commitments may be without oath.

1 Salk. 347.
5 Mod. 78.

3. Exception, That the commitment is generally for high treason; and it has been urged, that some particular species of treason must be expressed, and that it must have so much certainty, as to appear to be high treason to the court. 2 *Inst.* 52, 591. I think this opinion is not to be maintained. We presume a magistrate does right, till the contrary appears; and it has never been held necessary to express the overt act in the commitment. My Lord *Coke* puts the case of treason *contra personam Regis*, and admits that to be sufficient.

Commitment for high treason generally, is good. *2 Inst. 52, 591.*
N. B. This exception had been over-ruled before in this term in the case of Mr. *Harvey* of *Combe*.

4. It has been argued in favour of this last exception, that the *habeas corpus* act supposes the crime to be specifically mentioned; because it provides, that no person shall be committed a second time for the same offence, after he has been once bailed; the consequence of which is, that the court must judge by the two commitments

mitments whether the offence be the same. This argument will appear of little weight, if we consider how easy it is to vary the expression in the second commitment, and yet keep close to the principal charge. Suppose a man is committed for levying war against the King, and after he is discharged, is again committed for compassing the death of the King: These two facts appear very different upon the face of the commitments, and yet he that is charged with the one, may likewise be charged with the other; and if this objection should be held good, the consequence would be, that a man may be committed as often as the secretaries of state can vary the expression; for several species of treason may be the same fact.

5. The case of *Kendal and Roe*, 1 Salk. 347. 5 Mod. 78. has been relied upon by the counsel for Sir *William Wyndham* as a case in point. But I am of opinion, it will not come up to that now before us. They were committed by a warrant dated 24 Oct. 1695. being charged with assisting to the escape of Sir *James Montgomery*, who was guilty of high treason. Exception was taken, that the treason of Sir *James Montgomery* was not expressed in the warrant; and the fact he was committed for might not be high treason, tho' mentioned to be so. The case did not turn upon that single point, for it was held necessary, that Sir *James Montgomery* should be averred guilty of, and committed for high treason. And because both those Particulars were not expressed in the warrant, the defendants were admitted to bail. A commitment, it is true, for stealing fruit generally would not be good, because if it was upon trees, it would be no felony. 2 Inst. 52.

1 Anderf. 297. There is a case in *Anderf.*, which was to be a direction for the
Rush. Collect. future in making commitments, which is entred in the council
3 Car. book. In *Crofton's* case, which is reported in 1 Sid. 78. 1 Keb.
305. it was resolved, that a commitment for high treason generally
is good. Vaug. 142.

I think I have now taken notice of all the exceptions taken to the commitment. The next thing relied upon is the illness of Sir *William Wyndham*, which appears to be a distemper incident to the family. We are of opinion, that this is not ground enough singly, to induce the court to admit Sir *William* to bail: For it must be a present indisposition, arising from the confinement; and so we held this term in the case of Mr. *Harvey* of *Combe*, who stabbed himself after his examination; and was refused to be bailed, because his illness was from an act of his own. But I shall not enlarge upon this head, since we are all of opinion, Sir *William Wyndham* ought to be bailed. There have been four terms passed
since

since his commitment, and one affizes in *Somertshire*, out of which county it has been hinted the ground of the complaint against Sir *William Wyndham* arises; and therefore there being no prosecution against him, he must be admitted to bail, himself in 10000*l.* and four sureties in 5000*l.* each.

A year's imprisonment without any prosecution, inducement to the court to bail.
Salk. 103.
2 Sid. 179.

Vernon *vers.* Goodrich. In C. B.

THE plaintiff declares, that whereas she is possessed of an house in *Ipswich*, to which water was conveyed by a leaden pipe from the conduit house; the defendant nevertheless has placed *quaedam epistomia vocat. stopcocks in canali plumbeo praedicto*, and thereby hindered the water from coming to her house, and that the defendant has diverted great quantities of water, by which she lost the use of her house.

Where the plaintiff declares upon a possession only, and the defendant pleads *liberum tenementum*, the plaintiff must shew a

title in the replication, and must not barely rely on traversing the defendant's title. Yelv. 147. Poph. 1. Salk. 335.

The defendant pleads, that at the time in the declaration, *et diu antea*, he was seised in fee of half an acre of ground, being his garden, and lying between the conduit house and the house of the plaintiff: And being so seised, he placed the said leaden pipe in his said garden, *ad utend' ill' ad ejus beneplacitum*; and therefore he fixed the said stopcocks, *prout ei bene licuit, quae sunt eadem, &c.*

Demurrer inde, et pro causa, quod materia praed' non est placitabilis in barram actionis praed', sed tantum in retardationem responsionis ad inde habend', donec legalis titulus ad aquam praed' per ipsam (the plaintiff) ostensus fuerit.

Selby Serjeant pro quer. That the plea is ill. It is not sufficient in this case for the defendant to say, it is his freehold; for that may be true, and yet the plaintiff be intitled to the watercourse. Where the plaintiff prescribes for *separal. piscar.* it is not enough for the defendant to say, it is his freehold. 17 E. 4. 6. b. 7. a. 10 H. 7. 24. b. 18 H. 6. 29. b. 34 H. 6. 28. a.

That the plea should not be generally in bar of the action, but only till the plaintiff shew a title. The defendant has given no answer to the diverting great quantities of water; and therefore he prayed judgment for the plaintiff.

Brantbwayte Serjeant contra. That the plea is a good plea: Formerly the plaintiff must have set out a grant or prescription; but it

is since settled, that to say generally he is intitled, is enough against a wrong doer. But it is still necessary to set out a grant or prescription, when the action is against the owner of the land; and as this is laid generally, it is enough for the defendant to shew he is not a wrong doer. 1 *Ven.* 274, 319. 2 *Ven.* 186, 291. If trespass is brought for erecting coneyboroughs to the prejudice of the common, it is enough for the defendant to shew himself lord of the manor. *Lutw.* 107. *Yelv.* 104.

Flow. 26. a.
et alibi in that
case, 5 Co.
121. a.

A plea to a common intent is good. And we may as well bring the matter of law before the court, as a jury. But it not being shewn for cause of demurrer, the plaintiff cannot take advantage of the plea's amounting to the general issue. 2 *Saund.* 401.

27 H. 8. 7.
Finch Law
396.

We have pleaded *liberum tenementum*. And if the plaintiff has any title, she may shew it in her replication. And by her demurrer she admits she has no title. If the trespass was in another place, she may shew it by new assignment.

Where the
plaintiff claims
an easement
out of the de-
fendant's soil,
the declara-
tion must set
out the title.

King C. J. It is hard to say here are two charges. The wrong is the stopping the water, the carrying away is only aggravation. This declaration is upon a possession, which is only good against a wrong doer, and therefore the plaintiff must shew a title. The defendant claims the soil, out of which the plaintiff claims an easement; and therefore she must shew her title. If it had appeared in the declaration that it was the defendant's soil, and the plaintiff had not prescribed, the declaration would have been bad.

Blencowe, Tracy and Dormer Justices, accord', and the plaintiff afterwards discontinued upon payment of costs.

Parishes of Pancras and Rumbald in Suffex.

Justices of
peace may
supersede their
own order
quia improvide
emanavit.

ORDER of two justices for the removal of a poor person from the parish of *Pancras* to *Rumbald*. Within three days the justices, reciting that they were surprized, supersede it, and command the churchwardens to return the former order to be cancelled.

Whitaker Serjeant insisted, That the justices could not issue such a *supersedeas*; and cited *Salk.* 472.

Sed per Curiam, The *supersedeas* is well sent by the justices, and to prevent the charge of an appeal; and the last order was confirmed.

Michaelmas

Michaelmas Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice*.

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

John Fortescue Aland, *Esq; Solicitor General.*

Memorandum; Mr. Justice Powys was absent all this term, being indisposed with the gout.

Johnson *vers.* Louth.

MR. Solicitor General moved, that the defendant, being a gunner, might be discharged upon common bail.

The gunner in a train of artillery is the same as a common soldier, and common bail sufficient.

Baines contra. The gunner is appointed by warrant, and is in the nature of a commission officer, he receives 1 s. *per diem* pay, and takes an oath; and a gunner is so much esteemed, that it is very difficult for him to get leave to lay down his post.

Solicitor Gen. He is listed as common soldiers are, and is liable to all the penalties in the act of parliament as common soldiers are.

C. J. I am informed, that the gunner is within the description of a common soldier. The extraordinary pay is only in consideration of the skill which is requisite in his place.

Eyre and Pratt Justices, accord'. And he was discharged upon common bail.

Rex

Rex *vers.* Helling.

Intr. Trin. 2 Geo.

In orders for paying wages it ought to appear the service was relating to husbandry.

Indictment for not paying servants wages, reciting an order of two justices, whereby it appeared, that 9 *l.* was due, which the defendant refused to pay, having had notice of the order.

Glyde pro defendente. The order is void. It does not set out the labour of the servant, and is only generally *pro salario*; the justices have only jurisdiction in case of husbandry; and the order ought to shew, this was a matter within their jurisdiction.

Eyre J. The practice is, if an order be for paying wages, it is supposed to be such as the justices have power over. *Salk.* 441, 484.

C. J. and *Pratt J.* of another opinion. And *Hil. sequente* the indictment was quashed.

Rex *vers.* Powell & al'.

De scriptis decipiebant is too general in an indictment.

SIR William Thompson the Recorder moved to quash an indictment against the defendants, for deceiving one Davila of several lottery orders. It is *de scriptis bonis & catallis* of Davila *decipiebant et defraudabant*; this is trover in effect, and too generally laid. 2 *Rol. Abr.* 79. *Mod. Cas.* 311. *Et per Curiam*, This is too general, and was quashed without putting the defendant to demur to it.

Brett *vers.* Minter & al'.

Intr. Hil. 1 Geo. rot. 318.

Where the plaintiff replies full Age of the defendant, it is not necessary to lay a *venue* as it is of a release.

THIS was a writ of error *coram vobis*, and the error assigned was, that one of the defendants, being an infant, appeared by attorney. The plaintiff pleads, that he was of full age; to which the defendant demurred, and shewed for cause, that the plaintiff has shewn no place where the defendant was of age.

Fazakerley pro defendente. Infancy must be tried by the country, and therefore it is necessary to lay a *venue*. *Godb.* 382. *Collin v. Taylor.* *Latch* 194. And in *Trin.* 12 *Ann.* *Wellell v. Glover*, a release was pleaded without a *venue*, and held ill, though it was insisted,

insisted, that the name of the county in the margin was sufficient, to which it was answered, that the release might be in another place.

Brantbwayte Serjeant *contra*. Incapacity of the person may be tried where the action is laid. The defendant is of age every where.

C. J. Full age is not local, as the executing a release; the place is no certainty of the fact, as it is in the case of a release. What is personal attends the person every where; if he is of full age any where, he is so every where.

Adjournatur; and the last day of the term the chief justice delivered the opinion of the court.

C. J. The qualities of the person are to be tried where the action is brought. Nonage to a release where the release is laid to be made. I have looked into the case of *Collins v. Taylor*, which is oddly reported; and therefore I perused the record, which is thus: The error assigned is appearance by attorney for an infant, then it goes on, *Eo quod videtur curiae*, that there is no venue; *Ideo consideratum est quod the defendant assignet errores de novo*: Then it is, *Eo quod defendens tali die* appeared by attorney *apud Westminster*, *quo tempore* he was an infant, &c. I think it was not necessary to mention all that, for it appeared upon the record. In this case, if there be any fault it is in the plaintiff in error, and the defendant had nothing to do but to follow him.

Qualities of the person triable where the action is brought. *Vide Mod. Caf. Lett v. Mills. Salk. 6.*

Lill. Entr. 489.

Judgment affirmed.

Dominus Rex *vers.* Bishop.

Defendant was convicted of printing a seditious libel, and appearing to be in a very ill state of health, was brought up, and moved for the judgment of the court, and to be admitted to bail.

Convict for a libel being ill, was bailed before Judgment.

C. J. The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore bail him for the present, and we will give judgment when he is better. Defendant in 2000 *l.* two sureties in 1000 *l.*

N. B. He died within a few days after.

Dominus Rex *vers.* Inhabitants of Hyworth.

Order to pay money to a poor person must mention him to be poor and impotent.

ORDER to pay 3 s. weekly to *A.* by the parish of *Hyworth*, so long as he shall continue poor.

Martin. By the statute 43 *Eliz. c. 2.* it ought to appear, they are poor and impotent. 1 *Keb.* 489. 2 *Keb.* 744, 643. *Pasch.* 1 *Geo. Rex v. Calley.* An order for a father to pay so much to his daughter was quashed, because not said *poor and impotent*, but only that she is in a poor and destitute condition, and wants relief. 5 *Mod.* 197. And *poor* is to be understood, *poor old*, *poor blind*, *poor impotent*.

C. J. I favour these orders as much as I can, because no body takes care to draw them up for the poor. But it must be quashed.

Pasch. 3 *Geo. Rex v. Inhabitants of Stoke-Ursey.* On the authority of this case an order was quashed for the same fault. So *Pasch.* 4 *Geo. Rex v. Tipper*, an order to maintain a daughter-in-law.

Parishes of Holy Trinity and Shoreditch.

A. is bound to B. but serves C. his settlement is in C.'s parish.

PARKER, C. J. delivered the resolution of the court.

This is an order for the removal of one *Ferrer* from the parish of *Holy Trinity* to *Shoreditch*: by which it appears, that *Ferrer* was bound as an apprentice to one *Truby*, with intent that he should serve *Green*; which he did for three years. And it has been insisted, that he being bound to *Truby*, who lives in *Trinity* parish, his settlement is there; and not in *Shoreditch*, where the service was.

Salk. 68. Difference between apprentices and other servants.

But we are of opinion the justices have done right in sending him to *Shoreditch*, where the service actually was. It is the same thing as if *Truby* had turned him over to *Green*; in which case there would have been no question, but he had gained a settlement in *Green's* parish. If the master removes out of one parish into another, the apprentice gains a settlement if he lives there forty days. The turning over an apprentice is like the assigning any deed. In this case *Truby* was only a trustee. There is a great deal of difference between apprentices and other servants; for apprentices are not presumed to become chargeable, because the trade and mystery they learn is their estate. Therefore the order must be confirmed.

Garner *vers.* Anderfon.

IN replevin out of the county court, the plaintiff declared for taking his cart and four horses in *Nithingall-lane* in the parish of *Stepney*. The defendant pleads in abatement, that he took the goods in *Nithingall-lane* in the parish of *St. John Wapping*, *absque hoc* that he took them in *Nithingall-lane* in the parish of *Stepney*. *Et pro retorn' habend'* he sets forth his title to the goods as a deodand.

Declaration in replevin amended after plea in abatement. Pas. 1 Geo. 2. On the authority of this case the parish was amended, *inter Lord Gage and Robinson*, after the same plea in abatement.

Hall Serjeant moved to amend the declaration, and alledge the place to be in the parish of *St. John Wapping*; for the one side of that lane to the causey is by act of parliament in the parish of *Stepney*, and the other side in the parish of *St. John Wapping*, and the goods were taken in that side of the lane which is in *Wapping*. The fact was, that a servant of the plaintiff's was driving a cart, and by chance he run over and killed a child; upon which the defendant seized the cart and horses as a deodand, and the servant was tried for the murder, and found *per infortunium*.

Brantbwayte Serjeant *contra*. If this should be amended, all pleas in abatement will be set aside. *Pasch. 2 Ann. Leper v. Germain.* 1 Salk. 50. *Assumpsit* was brought by bill against defendant as a knight, he pleads in abatement that he is a knight and baronet; and the court refused an amendment. *Hil. 1 Geo. Mears v. Bowes in C. B.* was the same case as this, and the court would not grant an amendment. Nothing is removed out of the county court but the plaint only; and therefore if issue is joined in the county court, the plaintiff must declare *de novo*.

C. J. In the case of *Leper v. Germain* there could not be any amendment, because the commencement of the suit was wrong, and nothing to amend by. The foundation of amendments by the court, whilst the proceedings remain in paper before they be recorded, is, That these papers, delivered to and fro, supply the declaring and pleading *ore tenus* at the bar, and may be amended as easily as if spoke at the bar. These faults stiled errors of the clerk are amendable after the proceedings are recorded.

Afterwards upon deliberation the court granted leave to amend upon payment of costs.

Thrustout

Thrustout *vers.* Peake & al'.

Int. Trin. 8 Ann. rot. 108.

Devise to A.
and B. for
their lives, e-
qually to be
divided, and

UPON Not guilty in ejectment for the manor of *Welball* and other lands in *Com' Norf'*, on the demise of *Edmund Miller* Serjeant at law, the jury find this special verdict.

after their deceases to their heirs male of their bodies, equally to be divided, and if either of them die without issue, then to the survivor and his heirs male. A. and B. make partition, and B. levies a fine and suffers a recovery of his part, and dies without issue. The entry of A. is taken away, and no title accrues to him by the survivorship.

Pollexf. 428.

That *Roger West* being seised in fee (*inter alia*) of the premises in question 23 *March* 1697, made his will in writing, wherein was the following clause, "And my further will is, and I declare, that
" if it shall happen, that at the time of my death, I shall leave no
" child or children begotten by me on the body of my said dear wife,
" or if she be not with child or breeding at the time of my death,
" then I give, devise and bequeath all and singular my manors, lands,
" tenements, &c. which are freehold, in the counties of *Bucks*,
" *Hertford* and *Norfolk*, or elsewhere in the kingdom of *England*,
" unto my aforesaid dear wife for and during her natural life, or so
" long thereof as she shall remain my widow. And as for my estate
" in the county of *Norfolk* not as yet any ways disposed of, but to
" my said wife for life or widowhood as aforesaid, I hereby give,
" devise and bequeath the same after the decease or marriage of my
" said wife as aforesaid, unto my nephews *Edmund Miller* and *Ro-*
" *bert Sharrock* during their natural lives, equally to be divided be-
" tween them, and after their deceases then to the next heirs male of
" their bodies lawfully to be begotten, equally to be divided between
" them; but in case either of them the said *Edmund Miller* and *Ro-*
" *bert Sharrock* depart this life without such issue, then I give, de-
" vise and bequeath the same estate in *Norfolk* to the other of them
" for life, and after his decease to the heirs males of his body law-
" fully to be begotten." And for want of such issue of both of
them, he devised it over to others, with a remainder to his own
right heirs, and then goes on; "Provided always, that if any of
" the devisees should fell timber, other than for repairs or firewood or
" likely to decay, it should be a forfeiture of their particular and re-
" spective estates."

They find further, that *Elizabeth* wife of the testator died in his life-time, and afterwards the deviser died without issue. That the two devisees *Edmund Miller* and *Robert Sharrock* entred and were seised

seised *prout lex postulat*; and by their indenture dated 5 May 1700, reciting the devise, and to the end that each party may know and enjoy his own share and moiety in severalty, "They the said Edmund Miller and Robert Sharrock do by these presents, for themselves and their heirs males, make and deliver an equal, perfect and absolute partition of all the said manors, lands, &c. to and between the said Edmund Miller and Robert Sharrock in two parts, in manner and form following, (*viz.*) That he the said Edmund Miller, and the next heirs male of his body, shall have, hold and enjoy to his and their own several use, according to the limitations in the said recited will expressed, *but for no greater or other estate, or quantity of estate, than he or they can or may have by virtue of the said Roger West's will*, all that the manor, &c. in full satisfaction of all his the said Edmund Miller's and his next heirs male mentioned in the said will, part, portion, share and moiety, *but for no greater or other estate than he can or ought to take by virtue of the said will*. So in like manner, that Robert Sharrock shall hold and enjoy *all that the manor of Wellhall in Gayton, &c.* and each covenanted to rest contented therewith." That Edmund Miller and Robert Sharrock entred and enjoyed their parts in severalty. That John Lyng prosecuted a writ of covenant *de manerio de Gayton Wellhall* against Robert Sharrock, *teste* 2 Oct. 13 W. 3. *ret'* Octabis Martini, on which a fine was levied. And that by deed dated 2 Oct. 13 W. 3. it was covenanted between Robert Sharrock, John Lyng and John Carter, That Robert Sharrock should levy a fine to John Lyng of the manor of Wellhall in Gayton, to the intent to suffer a common recovery, and that John Carter, before the end of Michaelmas term then next ensuing, should sue a writ of entry *sur disseisin en le post* against John Lyng, who should vouch Robert Sharrock; which fine and recovery then to be levied and suffered should be to the use of the said Robert Sharrock in fee. That though this deed was dated 2 Oct. 13 W. 3. yet it was not executed till 26th November following, but nevertheless that it was executed before the suffering the recovery at bar. And that there is no other declaration of the uses than as aforesaid. That John Carter sued a writ of entry *de manerio de Gayton Wellhall*, *teste* 16 Oct. 13 W. 3. *ret'* Crastino Animarum, upon which a common recovery was suffered, (which is found *in haec verba*) and a writ of seisin thereupon prosecuted by the said John Carter *teste* 6 November, returnable *indilate*; upon which the sheriff returned, that he delivered seisin 24 November, which is two days before the execution of the deed. That the lands in the fine and recovery are the part allotted by the deed of partition to Robert Sharrock, and mentioned in the deed of 2 October 13 W. 3. That 16 February 1707, Robert Sharrock so seised died without issue, and that Elizabeth Sharrock his sister and heir entered, and married Patrick Seagrave, Esquire, who became seised in right of his wife,

upon whom the lessor of the plaintiff entered, and made the lease, and was possessed until ejected by the defendants, *sed utrum, &c.*

Reeve pro quer' argued, *First*, That the two devisees *Edmund Miller* and *Robert Sharrock* take only estates for their lives as tenants in common, with cross remainders for their lives; and that the devise *to their next heirs male* is a remainder in contingency only, and not executed. If it had been to them for life, remainder to their heirs male, it had been an estate-tail executed. 1 Co. 66. *Archer's case*. Where by a devise to *Robert Archer* for life, and after to the next heir male of *Robert*, and to the heirs male of the body of such next heir male, it was adjudged, that *Robert* took only an estate for life. (1st), Because he had an express estate for life devised to him; and (2^{dly}), The remainder was limited to his next heir male in the singular number; though that second reason given in *Archer's case* was denied for law, because *heir* is *nomen collectivum*, and one can have but one heir at once, and this shall go from heir to heir. *Cro. Eliz.* 313. 1 *Roll. Abr.* 822. K. pl. 1. *Owen* 148. *Clark v. Day*. Yet *Archer's case* is good law; the true reason of that judgment was, because the words of limitation *to the heirs male of the body of such next heir male* were added to the *heir*; therefore *heir* was construed to be *designatio personae*. 1 *Vent.* 216, 232. In the case at bar it is limited, by express words, That they shall have but for life, and then consequently the heirs shall take as purchasers.

2^{dly}, The words *equally to be divided* being added to the *heirs male*, as well as to the two devisees, prove the intent of the testator to be, that the heirs male should take as purchasers, and not by way of limitation. Had the devise been to the two devisees and to their heirs males, equally to be divided, these words *equally to be divided* might have been applied to the two devisees; but here it being twice repeated, the last must be rejected, if the heirs are to take only by way of limitation. These words in a will make a tenancy in common. 3 Co. 39. b. 2 *Roll. Abr.* 89. *Salk.* 390, 391. 1 *Vent.* 376. 2 *Vent.* 365.

The rule will be objected, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is mediately or immediately limited to his heirs in fee, or in tail, that always in such case *his heirs* are words of limitation of the estate, and not words of purchase. As to that rule, it only holds place where the remainder is executed, and not when the remainder is in contingency. 2 *Roll. Abr.* 418. H. pl. 5. *Litt. Rep.* 258.

3dly, The proviso in the will for the devisees to forfeit on cutting down timber, proves the devise to be but an estate for life; for if it is an estate-tail the proviso is void. 1 *Vent.* 216, 232. *King v. Melling.* Such an argument from the proviso is a forcible one.

Secondly, Whether the two devisees shall not have cross remainders for their lives by implication, with a remainder to their next heirs males in contingency only, and not executed; so that after the death of the one the survivor shall have an estate for life in the whole, and not the heir male of the person deceased. *After their deceases* in the will shall be taken jointly, (that is) after both their deceases it shall remain to their next heirs male. Such a construction shall be made in the case of a will, but in the case of a conveyance at common law such words may be construed distributively, so that after the decease of either, his part shall remain to his next heir male. 5 *Co.* 7. *Wyndham's Case.* The words of a will shall be always followed, except the intent of the testator appear in the will to be contradictory to the words. 2 *Jones* 172. *Raym.* 452. *Pollexf.* 125. *Holmes v. Meynell*, a case in point. 4 *Leon.* 14.

If they take but an estate for life, the fine and recovery by *Robert Sharrock* was a forfeiture of his estate, and a right of entry was given to the other devisee (the lessor of the plaintiff) which is sufficient to preserve a contingent remainder. 1 *Vent.* 188. *Trin.* 6 *Annae*, *Devise to A. and B. jointly for life, remainder to the heirs of A. they are jointenants, and the survivor shall have the whole for life.* *Tuckerman v. Jeffery.* That was a devise to two *femes*, *Elizabeth* and *Jane* for their lives, equally to be divided between them, remainder to the heirs of *Jane*. *Jane* died, and *Elizabeth* survived; and the question was, whether *Elizabeth* should have the whole during her life, or the heir of *Jane* have that part immediately whereof *Jane* died seised? And the court held, that *Elizabeth* and *Jane* were jointenants, and that consequently the survivor should have the whole during her life, and the heir of *Jane* have nothing till the death of *Elizabeth*. Therefore this construction answers the words *after their deceases*, and does not destroy the authority of the case of *Holmes v. Meynell*. *Vide Co. Lit.* 184. a.

Thirdly, The following part of the devise, *If either of them depart this life without issue, then I give the same estate to the other of them for life*, cannot make it to be an estate-tail executed. 1. Because an express estate for life is only devised to them. 2. If it is an estate-tail it must be by implication, which is contrary to the rule of law, That no implication shall be allowed against the express words of a devise. *Cro. Eliz.* 313. *Owen* 148. *Moor* 593. 1 *Rol. Abr.* 839. pl. 4. 11. which reports do differ.

C. J. And neither of them right.

Reeve. Those words cannot create it an estate-tail, by reason of the intervening contingent Remainders to the next heirs male of their bodies. *Cro. Eliz.* 315. *Cordall's case.* Where upon a devise to *Edward Cordall* for life, remainder to his first son, remainder to the heirs of the body of *Edward Cordall*, he then having no son, it was resolved, that the estate-tail was not executed, for the possibility of the mesne estate intervening, and therefore it was disjoined during the life of *Edward Cordall*; though that case has been denied for law. 2 *Saund.* 386. And it has since been adjudged, that the remainder shall be vested, till the contingent remainder comes *in esse*, and then the estates shall be opened and disjoined for the letting in of the contingent remainder, because they were all created together by the same conveyance. 11 *Co.* 80. *Lewis Bowles's case.* 1 *Sid.* 83. 1 *Lev.* 36. 1 *Saund.* 386. 1 *Vent.* 345.

If they are jointenants for life, the question will be, what the fine, recovery and deed of partition have done. They cannot affect the remainder, whether contingent or executed, nor alter the quality or quantity of the estate devised. The deed can amount only to an agreement, of what lands each party shall receive the profits. Though it is recited to be, *to the end that each might know his part in severalty*, yet the deed is only, that each shall hold the lands according to the limitations of the will.

The recovery is found *in haec verba*, and appears to be no more than the history of a recovery. It is in the preterperfect tense, *ſ. C. petiit*, and not *petit*.

Eyre J. That cannot be taken advantage of here.

Reeve. The fine and recovery are not of the same manor, as the deed to make the tenant to the *praecipe*. The one is *de manerio de Gayton Wellball*, and the other is *de manerio de Gayton in Wellball*; and though the jury find the lands in the fine and recovery to be the same as in the deed, yet they do not find the manor to be the same. The fine and recovery are void, for there is no tenant to the *praecipe*; for the recovery is had, and judgment given, before the *teste* of the writ of *seisin*, which is 6 *November*, and *seisin* delivered the 24th, and the deed is expressly found not executed until the 26th. And the finding the deed executed before the recovery had at bar, being contrary to the record, is void. 11 *H.* 6. 42. The finding a person dead, who appeared in court at the trial, was held to

to be a void finding. And therefore he prayed judgment for the plaintiff.

Brantbwayte Serjeant *pro defendente*, admitted that this was a tenancy in common; but he argued, that it is an estate-tail, and not an estate for life only. The words *equally to be divided between them* were only to shew, that the testator intended a tenancy in common. *Cro. El.* 695. *Lewen v. Cox.* *Archer's* case was adjudged but an estate for life, by reason of the limitation upon a limitation, (*viz.*) to the heirs of the next heir male, which limitation is not in the case at bar. The intent of the testator will be best made out, by construing this an estate-tail; for he plainly designed the estate should go in the family. Though it is expressly given to him for life, and after his Decease to his next heirs male, yet it is an estate-tail. *Carter* 170. 2 *Lev.* 58. 3 *Keb.* 42. 1 *Ven.* 214, 225. *Pollexfen* 101. *King v. Melling.*

Devise to *A.* for life, and after his decease to his heirs male, is an estate-tail, and not a bare estate for life with a remainder.

C. J. That is certainly so, you need not labour that construction.

Brantbwayte. The partition alters the quality, though not the quantity, of the estate. For the intent of the deed was, for each party to enjoy in severalty. *Bishop of Sarum v. Philips*, 11 *W.* 3. *rot.* 377. *termino Mich. in B. R.* On a writ of error of a judgment in *C. B.* in a *quare impedit*, where the plaintiff sets forth, that *A.* and *B.* were jointenants of an advowson in gross, and by deed agreed to present by turns, and as tenants in common; and it was adjudged, that this deed amounted to a partition, and so the part allotted to *B.* descended to his issue; and a grant from the issue, under which the plaintiff claimed, was held good. Tenants in tail may make a partition, and thereby bind their issue if it is equal, if unequal, it will bind themselves only. As to the exception, that there is no tenant to the *praecipe*; it is sufficient if there be one at any time before the judgment. *Show.* 347. *Salk.* 568. And therefore he prayed judgment for the defendant.

1 *Salk.* 43, 754.

Reeve replied, Here is no tenant till after judgment. An advowson may be parted, so as to present by turns; but by this deed they agree to continue seised of the same estate.

C. J. The partition will not alter the estate, it only alters the right of survivorship. The difference in the names of the manor is not material. It appears there is no tenant made by deed, till after judgment. But the fine being levied, and no use declared, the recovery being immediately suffered of the same lands, and the writ of entry brought against the conuzee in the fine, shews that the

If a fine is levied, and no use declared, and a recovery had immediately against the conuzee, the fine shall be taken to make him a

VOL. I.

F

the

tenant to the *praecipe.* *Salk.* 676.

the intent of levying the fine was to make a tenant to the *praecipe*. This devise intends an estate-tail. *After their deceases* are but words of form; for if one devises to *A.* for life, and after his decease to *B.* for life, yet *B.* shall take the estate if *A.* forfeits, enters into religion, or becomes incapable to enjoy it; and he shall not wait till the decease of *A.* for the words were not meant as conditions. *Salk.* 230. *1 Ven.* 199. What the jury mean, that the Deed was executed before the recovery had at bar, I know not; for the law takes no notice, when a recovery is had at bar.

Eyre J. *Equally to be divided* is no more, than if one moiety had been devised to one, and the other to the other; unless something appears contrary in the will. Here can be no cross remainders springing after the death of one of the devisees, because it is limited *if either die, &c.* When a writ of entry is brought against the conuzee in a fine, there is no resulting use.

Pratt J. *accord'*, and judgment *pro defendente nisi, &c.* and absolute afterwards, no cause being shewn.

Dominus Rex *vers.* Bigg.

The writing
cross the face
of a bank
note, is pro-
perly called
an indorse-
ment.

THE indictment sets forth, that 19 Feb. 1714. *Joshua Odams* being employed and entrusted by the governor and company of the Bank of *England*, to make and sign bank notes, made and signed a bank note for 100 *l.* payable to *James White*, or bearer, 90 *l.* whereof was 22 Feb. 1714. paid to the bearer, and indorsed upon the said note, which indorsement the defendant 1 Mar. 1714. *erast, contra pacem, &c.*

The defendant pleads not guilty, and the jury find this special verdict.

That *Joshua Odams* was employed, and made the note as in the indictment set forth, and that 90 *l.* thereof was paid and indorsed *prout, &c.* That the defendant 1 Mar. 1714. with a certain liquor to the jury unknown, *totaliter expunxit et deleuit* the words, letters and figures of the indorsement. That from the time of making the act 8 & 9 *W. 3. c. 20.* to 28 November 1697. the method of the company was, to write the indorsements upon the backsides of their notes in black ink. But that ever since, the method has been, to write the payments upon the face of the notes, cross the writing, in red ink; which last mentioned writing has always ever since been called and esteemed an indorsement, upon such notes, *sed utrum, &c.*

This cause was argued at *Serjeants Inn*, in *Fleet-street*, before all the Judges. And the question was, whether the fact found by the jury would come within the general words of the indictment, and could properly be called an indorsement?

The defendant's counsel insisted, that the word *indorsement* signified a writing upon the backside of any deed or paper, 2 *Mod. Cas.* 86. *Salk.* 375. and that it being found, that the words razed out by the defendant were wrote upon the face of the note, he was no ways guilty of the fact in the indictment.

But it was held by all the Judges, That the defendant was guilty. For the writing upon the face of the note was of the same effect as an indorsement, and being introduced by the company in the room of writing upon the backside, and always accepted and taken to be an indorsement, was within the words of the indictment.

Accordingly at the next sessions of *oyer and terminer*, King C. J. of C. B. delivered the opinion of the Judges; and sentence was pronounced against the defendant; who was afterwards pardoned, upon condition to transport himself to *Minorca*.

Dominus Rex *vers.* Dawson.

At Serjeants Inn in Fleet-street before all the Judges.

Indictment for that the defendant *tali die anno et loco* a bank note for the payment of 520 *l.* *fabricavit et contrafecit*. Upon not guilty the jury find a special verdict.

Fabricavit in an indictment denotes forgery, and evidence of altering or razing will be good.

That *Conrade de Gols* being a person entrusted and employed by the governor and company of the Bank of *England*, 16 *January* 1715. made and signed a bank note for 220 *l.* which note was delivered to the defendant unaltered, who *erasit et alteravit* the said note, by turning the word *two* into the word *five*, whereby the said note, which was made only for 220 *l.* purported to be a note for 520 *l.* by colour whereof the defendant had and received of the Bank 520 *l.* *sed utrum, &c.*

The counsel for the defendant insisted, that the facts found in the verdict were not included in the general words of the indictment, *fabricavit et contrafecit*. That this was not counterfeiting or making a note, but only altering a note made. That this must be admitted to be a crime within the words of 8 & 9 *W. 3. c. 20.* concerning

concerning the Bank. But as the indictment is not for altering or razing, they prayed judgment for the defendant.

But the Judges were of opinion, that the indictment is well enough, for this was a plain forgery, if not a counterfeit, and *fabri-cavit* would denote as much.

Accordingly at the next sessions King C. J. of C. B. delivered the opinion of the Judges, and sentence was pronounced against the defendant, who was pardoned, upon condition to transport himself to *Minorca*.

Elwell *vers.* Quash & al'.

The warrant of one executor is not sufficient to enter judgment against the other.

THERE were three executors, one of which gave a warrant of attorney to confess a judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor, who gave the warrant, *de bonis propriis* for the costs.

Upon motion to set this aside, it was held to be ill, for executors may plead different pleas, and that which is most for the testator's advantage shall be received. 1 *Roll. Abr.* 929. A. 1. B. 5.

So *Pas.* 1 Geo. in C. B. *Baldwin v. Church*, one executor pleaded a good plea, and the other a bad one; and on demurrer judgment was given in C. B. for both the defendants, but reversed on error, and a new judgment given for the plaintiff against one executor only. This is really estopping the others from saying they are not executors, and being without their knowledge, it may be subjecting them to a *devastavit* for the paying of other debts.

The judgment was set aside.

Hilary

Hilary Term

3 Georgii Regis. In B. R.

Thomas Lord Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

Dominus Rex *vers.* Fox.

THE defendant being mayor of *Totness* the last year, was by Information the charter a justice of peace for the following year, without against a justice for whom the sessions could not be held. And the court granted absenting from an information against him for a voluntary absence. the sessions.

Cole and Hawkins.

Intr. Pas. 12 Ann. rot. 254 or 258.

PARKER, C. J. delivered the resolution of the court.

This is an *indebitatus assumpsit*, laid 16 January 1706. The defendant has pleaded *actio non accrevit infra sex annos*. The plaintiff has replied a bill filed 23 January, 12 Ann. and that the cause of action arose within six years before. The defendant has demurred generally, and it has been insisted on by his counsel that the replica-

In an *indebitatus assumpsit* the day is not material, and the alledging a different time in the replication is no departure.

tion is a departure, there being seven years distance between the day in the declaration, and the filing the bill as set forth in the replication.

But we are all of opinion notwithstanding that the plaintiff must have judgment. This being only a parol promise, the time alledged in the declaration is only matter of form, not of substance; and not being a departure in a material point, is only a defect in form of pleading, which not being shewn for cause of demurrer pursuant to the act for the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promise, or the filing the bill to be another day, that would not have vitiated the proceedings. 1 Lev. 110. 1 Keb. 566, 578. Hob. 164, 199.

† Salk. 222,
223.
But in case
upon a pro-
missory note
it is.

If the day had been substance it would have been a departure; and so it was adjudged in this court, *Pas. 1 Geo. Stafford v. Forcer*. That was upon a promissory note dated in 1704. The defendant pleaded *actio non accrevit infra sex annos*; the plaintiff replied a bill filed 12 Ann. and after a verdict the judgment was arrested, because in that case the day was material. If the day in this case should be looked upon as such, it would be in the defendant's power in almost all cases to fix the time and place. As where the plaintiff brings an action of assault and battery in *London*, the defendant pleads he made the assault in *Middlesex*, and that afterwards the plaintiff released all batteries except in *London*. By this he would make the place material, and the doctrine of bringing transitory actions where the plaintiff pleased, would fall to the ground, if the defendant should be allowed by artificial pleading to make the time and place matter of substance. *Vide Co. Litt. 282. b. Tel. 114.*

Judic' pro quer.

Dominus Rex vers. Bond.

Filing of an
inquisition ta-
ken *super vi-*
sum corporis
five years after
the death,
when only the
head was to be
found, staid.

The jury
ought to view
the whole
body.

INquisition taken *super visum corporis* of a man that hanged him-
self; and the jury find him possessed of a messuage, which as a
felo de se he forfeited.

Pengelly Serjeant moved, to stay the filing of this inquisition,
upon an *affidavit* that the man died five years before, and the co-
roner dug up a skull, which he assured the jury he knew by a par-
ticular mark was the deceased's; and thereupon the inquisition was
taken: Which he insisted ought to have been upon view of the
whole body, that the marks if any may appear. *Regina v. Clerk,*
the

the court held that seven months was too late. *Salk.* 377. 2 *Mod.* Ca. 16.

Cur', Stay the filing till further motion.

Hawkshaw *vers.* Rawlings.

DEBT upon a bond. The defendant craved *oyer* of the bond, *et ei legitur, &c. petit etiam auditum conditionis ejusdem scripti, et ei legitur in haec verba, scilicet*; which appears to be for the defendant and two other obligors, joined in the bond, to pay money at a future day, *quibus lectis* he pleads payment at the day by the other two obligors, and an acceptance by the plaintiff in satisfaction. The plaintiff, *protestando* that the other two did not pay, for plea says he did not receive in satisfaction *modo et forma*; and thereupon issue is joined, and a verdict for the plaintiff.

Where the defendant pleads a payment and acceptance in satisfaction, the plaintiff may take issue upon the acceptance, which will be an argumentative denier of the payment.

Sir *William Thompson* moved, that a repleader might be awarded, for that this is an immaterial issue, the payment, and not the receipt, being proper to be put in issue.

Reeve of the same side. The bond being no where set forth in the *oyer*, but only the condition; it does not appear upon the record, that the two persons who, it is pleaded, made the payment, were bound in the bond: For the action against the defendant is *quatenus* upon a single bond, and then this payment will amount to no more, than a payment by a stranger, which will make the issue an immaterial one.

Sir *Robert Raymond contra*. It must be admitted, that there can be no payment in satisfaction, without a receipt in satisfaction: And therefore the denying the acceptance, is an argumentative issue, and will be good after a verdict. *Styles* 239. in *Mich.* 7 *W.* 3. *Young v. Rudd. Indebitatus assumpsit* for apothecaries wares; the defendant pleaded the delivery of a beaver hat, which the plaintiff received in satisfaction; the plaintiff, *protestando* that he did not give it in satisfaction, *pro placito* faith, that he did not receive it; and this was held a good issue. *Vide Hob.* 178. *Sty.* 239, 263. *Salk.* 627.

As to the second exception. If that be wrong it is amendable. The *oyer* is at the plaintiff's request, and should have been set out by him, which he neglecting to do, shall not take advantage of his own default. Admitting the payment is not by the two obligors, but strangers, yet where the defendant admits the plaintiff's cause of action, and pleads matter which is not a legal discharge,

charge, if issue be joined upon that, and a verdict against him, the plaintiff shall have judgment. 5 Co. 43. *Nicoll's case*.

Payment by a stranger not good, but acceptance is. If a creditor has different debts, he may apply the payment to which he will. 2 Mod. Ca. 123. 2 Chan. Ca. 83.

No payment in satisfaction without an acceptance.

C. J. Although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is. Suppose a man owes me 100 l. upon bond, and another 100 l. upon another account, and he pays me 100 l. I may apply it to which I will; and though he paid it in satisfaction of the bond, yet if I did not receive as such, it will be no discharge of the bond. And therefore in these cases the acceptance is the clearer issue. There are two requisites to work a discharge, 1. Payment, and 2. Acceptance. And a traverse of the acceptance, is an argumentative denial of the payment.

Pratt J. If by necessary consequence the replication denies the plea, and a verdict pass, the court may give judgment. There can be no payment in satisfaction, without an acceptance in satisfaction. And if the plaintiff says, that he did not accept in satisfaction; the consequence is, that it was not paid in satisfaction.

Judgment *pro quer*'.

Andrews vers. Franklin.

To pay within two months after a ship is paid off, is good in a promissory note.

CASE upon a promissory note to pay within two months after such a ship is paid off, and counts upon the statute.

Brantbwayte Serjeant insisted, That this is not negotiable, it being upon a contingency which may never happen. *Jocelyn v. Lasserre*, Hil. 11 Ann. rot. 214. in B. R. upon a writ of error, was a bill to pay out of the drawer's growing subsistence, and that was held not to be negotiable as a bill of exchange.

Sed per Curiam, The paying off the ship is a thing of a publick nature, and this is negotiable as a promissory note.

Judgment *pro quer*'.

Goodright

Goodright *vers.* Wright.

Intr. Hil. 11 Ann. rot. 412.

UPON not guilty in ejectment on the demise of *Richard Wood*,
the jury find this special verdict.

That *John Wood* being seised in fee of the premisses in question, by his will in writing 28 July, 8 W. 3. 1696. devised the same to his cousin *Edward Bazill* for life, and after his decease to the issue of his body; and in default of such issue, to his two nieces *Margaret* and *Susanna Wright*, and to the issue of their two bodies lawfully to be begotten; and for want of such issue, to the right heirs of *Edward Bazill* for ever. That *Edward* and *Margaret* (two of the devisees) died in the life of the devisor without issue, and that *Susanna* also died in the life of the testator, leaving one daughter *Margaret* the now defendant, who is also heir at law to *Edward Bazill*, and born 10 October 1702. That afterwards the testator died, and the defendant entered, upon whom *Richard Wood* the lessor of the plaintiff as heir at law to the devisor entered, and made the lease to the plaintiff, *sed, &c.*

Branthwayte Serjeant *pro quer'* argued, That the devise to *Susanna* is void by her death in the life-time of the testator. For every will must be construed as an instrument whereby the land must be conveyed, and then such a construction must be made upon the will, as would be made upon a deed; except in this particular point, that the party may not be forced to use such particular formal words, as must be made use of in a deed, (so that the words be sufficient to shew the intent of the devisor) because the law supposes a will to be made by one *inops consilii*; but however that intent must follow the rules of the common law. It is a general rule, which holds as well in the case of wills as of conveyances at common law, that by necessity there must be a donee *in esse* of capacity to take the thing given at the time when it ought to vest; and if there be no such person *in esse*, the gift is void. In this case there is no person capable to take the land, the devisee dying in the life-time of the testator, at which time nothing passed.

It may be objected that here are other words *issue of the body*, which are *descriptio personae* that is to take. As to that objection, those words *issue of the body*, are only named as words of limitation expressing the quantity of the estate which the devisee should take, and are not named to be immediate takers; for if so, other persons

VOL. I.

H

will

S. C. 1 Will.
Rep. 397.Devise to *A.*
and to his issue
(*A.* dying in
the life of the
devisor) is
void, and his
issue can take
nothing; and
a remainder
limited to the
right heirs of
A. is void also.
Vide Salk. 238.
Lat. 137.
2 Sid. 53, 78.
2 Mod. 313.But a devise to
A. and *B.* and
their heirs (*A.*
dying before
the devisor) is
a good devise
of the whole
to *B.* in fee.
Carter 2.
Salk. 238.
Show. 91.
Cas. in Can.
121.

will take the estate whom the devisor neither knew nor intended should take.

The making and commencement of every will must be considered, and not the consummation; (the death of the testator) which is founded upon the commencement. At the making the will *Susanna* had no issue; and therefore the testator could not intend, that the issue which should be born after the making the will should be a purchaser. In *Brett and Rigden's case*, *Plow.* 345. it was adjudged, that where a devise was to *Henry Brett* and his heirs, and *Henry* died in the life of the testator, the son and heir of *Henry* should take nothing by the devise; and that lands purchased after the making of a will do not pass by a devise of all his lands, because the law respects the commencement and intent of the devisor. And as to an objection that may be made, that this case differs from *Brett and Rigden's case*, this being an estate-tail, and that a limitation in fee; *Hartop's case*, *Cro. El.* 243. was a devise to *Thomas Hartop* and the heirs males of his body, with remainders over; *Thomas* died, leaving issue in the life of the devisor; and there it was held, that the estate cannot vest in the heir, because it never vested in the ancestor; for the word *heirs* was a word of limitation, and not to give an immediate estate; for if it was to vest in him, it must vest in him as a purchaser, and that was not the intent of the devisor; which case was then held not to differ from *Brett and Rigden's case*, *Cro. El.* 422. *Raymond* 408. 2 *Lev.* 243. 2 *Jones* 135. *Pollexfen* 546. Wherefore the devise being void, he prayed judgment for the plaintiff.

Reeve contra. That the word *issue* is a good word of purchase, either of a present estate, or of an estate by way of remainder; and not a word of limitation in a deed or conveyance at common law. And if so, it shall be the same in the case of a will, unless some certain intention of the devisor may be found in the will to alter the same. And therefore he argued, That the defendant might take either as jointenant for life with her mother and her aunt, and she being the survivor will have a good title; for if *A.* devise to *B.* and to his issue, and *B.* has no issue at the time, *B.* has an estate-tail; because the intent of the devisor was, that the issue should take; and therefore whenever it is demanded what estate such a devisee has, it depends upon the circumstances of the family, whether the devisee has issue at the time of the devise or no. The devisee is not of necessity to be *in esse* at the time of the devise, therefore a devise to an infant *en ventre sa mere*, is good. So a devise to *B.* his eldest son for life, and after to the eldest issue male of *C.* for life, is good, though *C.* had no issue at the time of the devise and death of the devisor, 1 *Roll. Abr.* 612. pl. 3. Limitations of uses have

have been coupled in the same construction as has been made on wills; therefore if a man make a feoffment in fee to the use of himself for life, and of such wife as he should afterwards marry for her life, and after he takes a wife; they are jointenants, and yet they come to their estates at several times. *Moor* 96. 1 *Inst.* 188. a. But he did not insist much on this point, it being adjudged contrary in *Wild's Case*, 6 *Co.* 16. The reason of the judgment in *Brett and Rigden's case*, "That lands purchased after the making of the " will do not pass by a devise of all his lands," depends upon the words of the statutes 32 and 34 *Hen.* 8. "that every person, having *Plow.* 344. b. " lands, may devise them." So that if the devisor has not the lands at 3 *Co.* 30. b. the time of the devise, it is out of the words of the statute, and all his lands, is no more than all he then had. *Pollexf.* 549. (Except there be a republication after the purchase. *Salk.* 237. *Pollexf.* 548. 1 *Vent.* 341.)

Secondly, The defendant may take by way of remainder for life. And for that *Wild's case*, 6 *Co.* 16. is strong in point, for there it is adjudged, that by a devise to a *baron* and *feme*, and after their decease to their children, they having children at the time of the devise, the *baron* and *feme* take but an estate for life, with a remainder to their children; and that a devise to *B.* and to his children or issue, he having no children at that time, is an estate-tail; the devisor intending that the issue shall take; and as immediate devisees they cannot take, not being *in rerum natura*; and by way of remainder they cannot take, for the gift was immediate to them and to their use; by which case it is proved, that if the gift is not immediate, as it is not in the case at bar, there being future words, "and to their " issue lawfully begotten," the defendant may take by way of remainder for life. But he would not insist much on this point, it having been settled, that by a devise to *B.* for life, and after his decease to the issue of his body lawfully to be begotten, *B.* took an estate-tail, and not an estate for life only, with a remainder to his issue. *King v. Melling*, 2 *Lev.* 58. 3 *Keb.* 42. 1 *Vent.* 214, 225. *Pollexf.* 104. 1 *Sid.* 47. *Carter* 171. *Secus* in a deed, *Pollexf.* 583. where an estate is limited to *A.* for life, remainder to his first son in tail; for there *A.* is only tenant for life, and the son takes by purchase.

Thirdly, The defendant has a good title as issue of the body, though the devisee died in the life of the devisor, admitting the devise creates an estate-tail. This point has never yet been settled, for the case of *Brett v. Rigden* was of a devise in fee, which differs from a devise in tail. *Hartop's case* was adjudged on another point, and in the case of *Fuller v. Fuller*, *Moor* 353. the court was divided; and *Popham* said, that by a devise to *B.* and the heirs of his body,
if

if *B.* was dead at the time of the devise, the heir should take as a purchaser. If a man has issue three sons, and devises his land to the eldest in tail, remainder to the second in tail, &c. if the eldest dies (having issue) in his father's life-time, his issue shall have it, because peradventure the devisor did not know of the death of his son, who perhaps was beyond sea, or otherwise absent. The statute *de donis* takes more care of the issue in tail, than of the tenant in tail himself, *quod voluntas donatoris in chartâ suâ manifestè expressa de cætero observetur*. There has not been one judgment whereby this point has been settled.

Fourthly, Which he chiefly relied on, admitting this to be an estate-tail, and the same construction ought to be made on this estate, as upon an estate in fee; the defendant has a good title, being found heir at law to *Edward Bazill*, by virtue of the remainder limited to the right heirs of *Edward*; which limitation is valid in law, though the first devise in tail should be void by the death of the devisee in the life of the testator, for the intervening estate limited to *Margaret* and *Susanna* prevents the consolidation of the two estates of *Edward*; for the estate limited to the right heirs of *Edward* is a distinct estate, independant on the estate-tail before devised to *Edward*. *Litt. §. 578*. If a lease for life be made, remainder to another in tail, remainder over to the right heirs of the tenant for life, the tenant for life may grant over the same remainder to another by deed. This limitation to the right heirs of *Edward* is a new created estate, and does not depend on the other estate, for those words, *right heirs*, are in this case words of purchase, and not words of limitation.

It may be objected, that it is a rule in law, "That when the ancestor by any gift or conveyance takes an estate of freehold, and after an estate is thereby limited mediately or immediately to his heirs in fee or in tail, that always in such case *his heirs* are words of limitation of the estate, and not words of purchase:" To that objection he insisted, that this rule of law extends only to such cases, where the ancestor takes the estate limited to him; so that if the ancestor never takes the estate, that rule can have no force. And in this case *Edward* never took any estate, and then the defendant as heir at law to him shall take the estate as a purchaser. That the reason of that rule depends upon a supposition that the ancestor takes the estate, is proved by 1 *Inst.* 22. *b.* 319. *b.* 376. *b.* 1 *Co.* 104. *a.* *Shelly's case.* 11 *H.* 7. 74. *per Hankford*. And therefore, if the devise to *Edward* and to his issue be void by his death without issue in the life of the testator, yet the remainder to the right heirs is good, being a distinct remainder: and no case proves, that a good remainder shall be tacked to a void devise, so as

Vide 1 *Inst.*
298. *a.*

to avoid the remainder ; wherefore he prayed judgment for the defendant.

Brantbwayte replied, *First*, That the defendant is found not to be *in esse* at the making of the devise, and therefore she cannot take as jointenant ; for all jointenants must be *in esse* when the estate should vest. Were they to take as jointenants, they could only take an estate for life, which construction would overthrow the intent of the devisor, which it is plain was to pass an inheritance. It is a constant rule, that a devise to one and to his issue in a will creates an estate-tail, without considering the circumstances of the family at the time of the devise, whether the devisee had then issue or not ; though the word *heirs* may be necessary in a deed ; so is *Wild's* case, and that case cited by my lord *Coke* out of *Bendloe*, is expressly against the opinion for which it was cited.

Secondly, That the defendant shall not take by way of remainder ^{3 Lev. 458.} the same answer proves, for then they would take only estates for life, when the devisor intended a fee-tail.

Thirdly, The devise is void by the death of the devisee in the life of the testator, for the issue cannot take as claiming from one who was never seised ; the issue in tail does not claim *per formam doni* by virtue of the statute *de donis* only, but also by descent from the donee in tail.

Fourthly, The heir cannot take it as a purchaser, for on a limitation to one and to his heirs, the construction has always been, that the heir shall never take as a purchaser, without that distinction, when the ancestor takes the estate and when not.

C. J. Had it been limited to *Edward Bazill* only for life, remainder to another for life, remainder to his right heirs ; this remainder in fee must have vested in *Edward*, drowning the first estate for life, and making his heir to claim by descent. *Wild's* case is very oddly reported, and has mistook the judgment of that case cited out of *Bendloe* as it is reported in *Bendloe*, and in 1 *Anderson* 43. pl. 110. Where an estate is limited to one and his issue, it amounts only to a description of that issue, for *issue* is more properly a word of description, than of limitation. There can be no question but that by this devise to *Edward* and to his issue he has an estate-tail, because it is limited over, *and for want of such issue then to another*. A devise to one and to his issue, is not restrained to the first son, but extends to all the issue *in infinitum*, (for *issue* is *nomen collectivum*) descending from the devisee. I can see no colour of difference between an estate-tail and a fee-simple, and I believe the

Cro. El. 423. report of that said by *Popham* in *Cro. Eliz.* is mistook. The statute *de donis* has nothing to do in this case, because the tenant in tail never took the estate. He that takes by purchase must take at the time when the estate should vest. The defendant cannot take by descent, because the ancestor never took it.

Powys, J. Litt. §. 578. makes strong against the defendant; for if the estate limited to the right heirs of *Edward Bazill* by the intervening estate-tail is distinct, and may be granted over by *Edward Bazill*; that proves, that *heirs* was meant only as a word of limitation, and not as a word of purchase, for else it could not be granted over by *Edward*, preserving his first estate. And the reason why it may be granted over is, because in judgment of law every man carries his heirs in his body.

Pratt, J. differed from the C. J. and conceived, that there was a difference between an estate-tail and in fee. The case of *Brett v. Rigden* must be allowed for law, that the devise by the death of the devisee, living the testator, is void; and the reason is, because the devisor had no intent in the devise to benefit any person but the devisee, for he did not know who would be heir at law to the devisee. A man has power by the statute to devise his lands, but he cannot raise such an estate as is inconsistent with the rules of law. When a man gives his lands to one and to the heirs of his body, it is plain that the devisor designed to benefit, not only the devisee, but also the issue of his body, thereby altering the common course of descent; therefore it is provided by the statute *de donis, quod donatoris voluntas, &c.* giving a benefit to the issue in tail, thereby intending to perpetuate the estate in his own name, and so intending a benefit to himself after his death. The issue are intended to have a benefit, though they were not *in esse* at the time of the devise, for the intent of the devisor was, 1st, for the devisee to take it; 2^{dly}, his issue, not considering how they should take; and then though the first devisee cannot take it, dying in the life of the testator, yet so far as the will can take effect, (which it may do in the issue) it must take effect. If it is limited to one man, remainder to another, though the first limitation be frustrated by the death of the party, yet the other remainder is good. Devise to an infant *en ventre sa mere* is good, by way of an executory devise; though the child is not born in the life of the testator: if the child is born, it is good by way of an immediate devise. Though a will cannot take effect *in omnibus*, yet as far as it can it must take effect. *Issue* is more properly a word of purchase than a word of limitation.

Upon this an *ulterius concilium* was granted, and the cause argued a second time, and this term *Parker C. J.* delivered the resolution of the court.

C. J. The question is singly, whether the devise be subsisting, or not? If it be subsisting, the title is with the defendant; if not, with the plaintiff. Resolution of the Court.

The case of *Brett v. Rigden* must be allowed to be good law; in which case it is resolved, that there must of necessity be a grantee or donee *in esse* capable to take, when the estate ought to vest, and that a devise to *Henry Brett* and his heirs (*Henry* dying in the life of the testator) could not take effect in the heir; and heirs in that case were only named to create an estate in fee in *Henry*, and not to make the heir take immediately by purchase but mediately by descent, and by *Henry's* death the estate fell as much with respect to the heirs as himself.

The case at bar has been distinguished from that in two particulars.

1. That the devise to *Edward Bazill* and his heirs is not an immediate devise, by reason of the intervening estates.
2. That a devise to *Susanna Wright* and her issue, is different from a devise to her and her heirs.

First, We are all of opinion that the intervening estate makes no difference. *His heirs* are words of limitation, and therefore like the case of *Brett v. Rigden*; the only difference is in the thing devised, one being an estate in possession, and the other a remainder. *Litt. §. 578. 1 Inst. 319. b.* In this case the ancestor never took the estate, which he ought to have done, to make it vest in him in remainder. *Shelly's case, 1 Co. 93.*

Secondly, If *Susanna* had survived, she would have had an estate tail; the words *issue of the body* create an estate-tail in her, and are as good an expression for an estate-tail, as the word *heirs* of an estate in fee. *Issue of the body* being therefore words of limitation, the devise of the estate-tail is void by the death of *Susanna* in the life of the deviser. The difference as to this between an estate in fee and in tail is not material, for if I devise one estate to *A.* and his heirs, and another to *B.* and the heirs of his body, it is in the power of *B.* to make this last estate as large as the devise to *A.* in fee.

It

It will be of dangerous consequence to alter resolutions in these cases, it is removing the antient land-marks; and the authority of *Brett* and *Rigden's* case, is not to be contested, which is not materially variant from this. But admitting it to be so, yet *Hartop's* case, *Cro. Eliz.* 243. was of a devise in tail, and there it was held, that the devisee dying in the life of the devisor, the devise could not take effect in the issue; and in the case of *Fuller v. Fuller*, *Cro. Eliz.* 423. all the Judges agreed with the resolution in *Hartop's* case, although *prima facie* it may seem as if *Fenner* and *Popham* were *contra* to *Gawdy* and *Clench*; yet upon nice observation it will be found, that they differed only with respect to the new publication, and not to the other point. *Popham* puts this case: If a man has issue three sons, and devises the land to his eldest in tail, remainder to the second in tail, remainder to the third in fee, and the eldest dies having issue in the life of his father, his issue shall have it without a new publication. But the reason is, because the heir of the eldest son was also heir at law to the devisor, and no intent appeared to disinherit any of his sons: And *Popham* said it might be otherwise on a devise to a stranger (which is the case at bar).

If the devisor had died immediately after making his will, the effect would have answered the intent; for then the word *issue* would have been a word of limitation in all the estates, and if that were the sense at the time of making the will, it shall be taken to be so still.

It was objected, that this is an estate-tail raised rather by operation of law than the intent of the party. (Answer) The law takes that to be his Intent, for upon a devise to *A.* and to his issue, or after *A.'s* death to his issue, the law has always construed this to be an estate-tail. If *A.* has two sons and four daughters, and dies before the devisor, the eldest son instead of having the whole would have but a sixth part, if it should be construed that the issue should take by way of remainder; whereas the intent of the devisor was, that the eldest son should have the whole during his life, which is a plain demonstration that the law takes such a devise to be an estate-tail. 1 *Ven.* 228.

The supposition of a kindness intended to the issue will be no argument in favour of the defendant, because it has been always thought that a devise to a man and his issue is a kindness to him, for by construction of law he carries his heirs in his own body. In this case the remainder man is more considered by the devisor than the issue in tail. The devise was for the sake of the father,
that

that he made it so large, and for the sake of him in remainder that he made it no larger. He cannot be supposed to have had any particular affection for the issue, there being none *in esse* at the time of the devise.

The plain use of the words was to give *Susanna Wright* an estate-tail. If she had lived she would have enjoyed it, but by her death the estate is determined. There is no difference between an estate in fee and in tail, for in both Cases the Devisee must be *in esse*.

The same answer serves for the remainder to the right heirs of *Edward Bazill*, who never took the estate, and therefore could not convey a descent to his heirs.

There is no inconvenience in putting the devisor in these cases to review his will; and the cases of *Brett v. Rigden*, and *Hartop's* case, are founded upon good reason and authority, and are not now to be over-ruled.

Judicium pro querente.

The defendant immediately delivered into court a writ of error *coram vobis*, and the court demanding of her attorney what error he had to assign, he told them infancy in the defendant, who had appeared by attorney, as error in fact.

C. J. The defendant ought not to be allowed to assign this error in ejectment, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppose. This is an abuse upon the court, and the attorney ought to be committed.

Infancy in defendant in ejectment and appearance by attorney ought not to be assigned for error.

Whereupon the attorney withdrew his writ of error, and the court gave him a fortnight to bring error in the Exchequer Chamber, upon the matter of law, and in the mean time execution to stay, and directed the record here to be amended, and the defendant made to appear by guardian.

Dominus Rex vers. Powell & al.

RULE for the prosecutor of an information *in natura de quo warranto*, to pay costs for not going on to trial, was moved to be discharged. *Sed per Curiam*, In the case of the King there can be no laches; but a subject in these prosecutions shall pay costs as in common actions. Executors and administrators pay costs for not going on to trial. Rule to pay costs.

Prosecutor of information in nature of *quo warranto* shall pay costs, 9 Ann. c. 20.

Cork *vers.* Baker. In C. B.

Intr. Trin. 11 Geo. rot. 1483.

Statute of
Frauds and
Perjuries ex-
tends only to
contracts in
consideration
of marriage,
and not con-
tracts to
marry.

THE plaintiff declares, that in consideration she promised to marry the defendant, he promised to marry her at his father's death, who is since dead, but the defendant refused so to do, and has since married *A. B.* which she lays to her damage 1000 *l.* and upon *non assumpsit* obtained a verdict for 300 *l.*

The defendant moved in arrest of judgment, that this *parol* promise is not good in law. But after argument it was held, that this is not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage; and that the case in 3 *Lev.* 411. has been contradicted by later resolutions. The defendant having married another person, has disabled himself to perform the promise, and therefore the plaintiff cannot apply to the spiritual court to have a performance decreed, but must be repaid in damages here.

Judicium pro querente.

Godfrey *vers.* Norris. At Guildhall.

The witness
being admini-
strator *de bonis*
non of the
obligee, proof
of the hand
was allowed.

DEBT upon a bond, *Non est factum* pleaded, and issue thereupon.

The plaintiff was administrator *de bonis non* of the obligee, and the only surviving witness to the bond; and the proof given upon this issue was only a person who swore to the hand-writing, and also several letters from the obligor making mention of this bond.

To this it was objected by the other side, that the hand-writing is not sufficient proof, where the witness is living. That it was the fault of the plaintiff to bring himself under this incapacity; he might have let another person have taken administration for his use, or administration *quoad* this bond only.

But it was ruled *per Parker C. J.* that this was good evidence; and he likened it to the case of a will, where the witness afterwards happens to be a devisee under the will, in which case if there be no other witness, proof of the hand is allowed.

Whereupon the plaintiff obtained a verdict.

Lockart *vers.* Graham.

Coram King C. J. de C. B. *at nisi prius.*

WHERE there were three obligors, and the action brought against one of them only, the other obligor was allowed to be a witness to prove the execution of the bond by the defendant; after a case had been made of it at *nisi prius*, and conference with Tracy and Dormer, Justices.

One obligor witness to prove the delivery by the other.

Sacheverell *vers.* Sacheverell.

At Serjeants Inn in Chancery-Lane, before a court of Delegates, 5 March 1716.

THE marriage of the plaintiff came in question after her husband's death upon granting administration, and it appeared they were married under feigned names at the Fleet. The widow produced an *affidavit* of the intestate's, made by him before a surrogate of *Doctors Commons*, that he was married to her; which *affidavit* agreed with the register, and referred to it. But it was objected, that the taking this *affidavit* was an extrajudicial act, there being nothing at that time before the ecclesiastical court; but the court here allowed it to be read in confirmation of other evidence. And the appeal was dismissed with 100 *l.* costs, and the marriage confirmed.

Affidavit of a dead man read to prove his marriage tho' taken before a surrogate, no cause being in court. 1 Will. Rep. 675.

Brown *vers.* Barkham. In Canc'.

SIR Edward Barkham having no issue of his own, and only one sister, and two cousins, Robert and Edward Barkham, 19 Jan. 1709. made his will, and devised the lands in question to trustees and their heirs, "in trust to sell sufficient to pay my debts, and to convey the residue to my cousin Robert Barkham and the heirs males of his body, and in default of such issue to the heirs males of the body of my great grandfather Sir Robert Barkham, remainder to my own right heirs for ever." Then he gives the interest of 2000 *l.* to his sister for her life, and the principal to her children after her death.

J. C. Proc. in Cha. 442. 461. In tot. verb. Gilt. Rep. 116. 131.
On a devise to the heirs males of the body of A. one who is heir male and not heir general shall nevertheless take by purchase.

Robert the first devisee died without issue in the life of the devisor, then the testator died, leaving a sister, who is heir general to Sir

Sir *Robert* the great grandfather; but the defendant *Edward Barkham* is heir male of the body of the great grandfather.

The question was, to whom the trustees should convey the surplus, whether to the sister, as heir general of the deviser, or to the defendant as heir male of the body of Sir *Robert* the great grandfather, remainder to the right heirs of the deviser.

This case was argued very largely at the bar. And *Cowper* Lord Chancellor took time to consider of it, and this term pronounced his decree.

Lord Chancellor. If the manifest intent of the testator, expounded by natural reason, without regard to legal resolutions, were to govern in this case; I should think it would hardly admit of a question. But since there is an artificial reason in the law, which sometimes stands as opposed to natural (which is right) reason, and is founded upon the opinions and resolutions of Judges, and that taken and allowed to be law; the courts both of law and equity ought to submit to them, when they are fully examined and found to be thus settled; because otherwise the law would be an uncertain undetermined rule, and lawyers would not know how to advise their clients. I shall therefore inquire how far this court is hindered in the present case by the fixed rules of law, from pursuing the plain intent of the testator, which was no doubt that the conveyance should be made to the heirs males of the body of Sir *Robert* the great grandfather, and not to a female, who is heir general to himself, as long as there are any heirs males of the body of the great grandfather.

First objection.

The first objection insisted on was, that it has been often adjudged, that he who takes as a purchaser by the words *heir of J. S.* immediately, must be compleatly heir of *J. S.* and that no person can take as heir whilst his ancestor lives.

I answer, That this maxim, and the cases founded upon it, are very foreign to the present question; one main ground of the resolution founded on this rule is, that the term *heir* in a legal sense denoting the person who is to take after the death of an ancestor, cannot be used as a proper description of a person whose ancestor is living, for the terms of the description are not then verified. But in this case they are compleatly verified; the ancestor is dead, and the person who asks the conveyance, is heir male of his body, and as such he is allowed by all to be capable to take by descent: But they say not by purchase. What grounds there are for that distinction will be considered hereafter; at present I shall only observe, that

that *Edward Barkham* having all parts of the description verified in him, his case is different from that of *Chaloner v. Bowyer*, 2 Leon. 70. where a devise was to the youngest son for life, remainder to the heirs of the body of the eldest; the youngest died in the life of the eldest, and the son of the eldest could not take. Why? because he answered neither part of the description, for he was neither heir, nor heir of the body of his father, while he was living; and this objection will hold in many other cases.

The second objection, which seems to stand in the way of natural reason is, that there are cases in which it is held, that none can purchase by the words *heir male of the body of J. S.* unless he be heir general as well as heir male. Second objection.

I have met with but few cases which can be urged with any colour of reason for the proof of this assertion; one is that of *Counden v. Clerk*, Hob. 31. in which it is said, that when the limitation is made to the heirs male or female of the body, they that will take must have both words verified in them, (that is) they must be both heirs, and also heirs male or female; and he gives this reason for it, that this is clearly without the letter and intent of the statute of *Westm. 2.*

In answer to the authority of this case,

1. I observe, that this was not the point then in question, but only an opinion of *Hobart's*, declared incidentally in the argument of the case, and therefore ought to have the less weight.

2. The reason that is given for it is by no means satisfactory, or a good one; for the statute *Westm. 2.* is no ways pertinent to the question. The whole effect of that statute is, to prevent the alienation of estates which before were considered at common law as fee-simples conditional, and alienable after issue had; and how this is applicable to the question concerning the description of a purchaser, and whether certain words will be sufficient for that, I cannot imagine. The statute only governs estates when they are vested, but meddles not with the descriptions that are necessary to pass those estates. The words *heir male of the body of J. S.* were certain and known words of purchase at common law, and need not the aid of the statute to make them so.

3. By what *Hobart* says afterwards in the same case, it may well be concluded, that had it been the point in judgment, he would have been of opinion, that a man might take by the description of

the heir male of the body of *J. S.* though he is not heir general, but a female is: For he takes notice that in the case then in question, the *heirs males* were not restrained to any body, which (says he) might have had some colour of help from the statute *de donis*. This great man could not pass over his own assertion which he made before, without some remorse of judgment, if it was his assertion; but I rather take the words *of the body* to have been added by an unskilful transcriber of the copy. So that upon the whole I think, that case of *Counden v. Clerk* of very little weight in the present question; but the point there adjudged is doubtless good law.

Another case urged for the plaintiff is *Shelley's case*, 1 *Co.* 103. which is transcribed into his *Co. Litt.* 24. *b.* This is indeed an authority (such as it is) in point, that one cannot take as a purchaser by the words *heir male of the body of J. S.* unless he be heir, as well as heir male. But in answer to this I observe,

1. That this point was not adjudged in *Shelley's case*; it is only the argument of counsel, which the court in delivering their opinion took no notice of.

2. The authorities in the margin of *Co. Litt.* which are cited to support this case, are most of them very little to the purpose, and do by no means prove it. That of *Hussy* in *Bro. tit. Done* 42. makes rather against this position; and that of *Dyer* 374. *a.* is only a short sketch of *Shelley's case*, and the less to be regarded, because it differs from the elaborate report of that case by *Coke*.

Having thus far cleared the present question from these two great authorities; there remains only one other, which I should not think very material to be taken notice of, had not the counsel for the plaintiff thought it of so great moment, as to desire a rehearing upon the discovery of it. It is the case of *Starling* in this court, 8 *W.* 3. and was thus: *A.* devised lands to *J. S.* for life, and then to trustees, in trust to convey them to the next heir male of the testator. And it was decreed, that the trustees could not convey to the next male relation, because he was not heir, which was certainly right, and the very point resolved in the case of *Counden v. Clerk*, and in that of *Askenbush*, which is cited in it; and the reason is, that the words *heir male* are not a sufficient description without adding *of the body*, and they are not answered, unless the person be both heir and male; nor are they sufficient to pass an estate by descent, any more than by purchase. Indeed in case of a will, the words *of the body* are supplied, so as to make it an estate-tail, in the person that takes it; but then the person that is to take it must be heir as well as male.

Having now gone through all the cases that were urged for the plaintiff, which I believe are all that could be urged; and it appears to me that many of the points in them are not pertinent to the present question, and those that were, *gratis dicta*, and the arguments of counsel, without grounds either from reason or former authorities to support them; I shall now proceed to shew, that a man may take by limitation, or purchase, as heir male of the body of J. S. though he be not heir general, and that for these reasons.

1. The law allows a man to purchase by a sufficient description, though neither his christian or surname be part of it, and that the words *heir male of the body of J. S.* are a sufficient description of that particular heir, though he be not heir general.

2. The judicial authorities that a man may take as a purchaser by the words *heir male of the body of J. S.* without being heir general, greatly over balance those that hold the contrary.

First, As to the first point, it is so certain a principle in law, that a man may purchase by other descriptions as well as by his name, that it has been adjudged the words *abbot or bishop* of a certain place, would be a good description, though the name of the person be mistaken. *Co. Lit. 3. a.* But to make a good description there are three things requisite, all which concur in the present case.

1. It must be true; it is true, that *Edward Barkham* is heir male of the body of the testator's great-grandfather, which is manifest, because otherwise he could not take an estate by descent as such, in case the great-grandfather had been seised of it to himself and the heirs males of his body, which all allow he would; and why he may not by purchase I cannot conceive, for the description is as true in the case of a purchase as a descent, and why should it not then be good as well in the one as the other. They say the statute *de donis* aids in the case of descent, but not in purchase; but I have already shewn that the statute does not at all relate to this point, for it meddles not with the descriptions that are to pass estates; and therefore if *heir male of the body of J. S.* be not a sufficient description, that special heir could not have any aid from the statute, and if it be a sufficient description, he does not want the aid of it. And the present case is the stronger, because the great-grandfather was dead at the time of the devise; so that the maxim *quod non est heres viventis*, is not in the way, but all the words are immediately verified at the time of the devise. It is said indeed, they are not, because the male is not heir in this case; but the very stating of this matter will expose it as contrary to common sense and reason; for it

is

is manifest the testator intended, that his heir general should not have these lands, unless he was a male also, and therefore he adds those words to restrain the general sense of the word *heir*, and to confine it to a special heir. If lands of the nature of *Borough English* at common law be devised to my heir according to the custom of *Borough English*, by this the testator must mean, his youngest son should take. But to prevent the taking in this case they would have you stop at the word *heir*, and then this special heir cannot take; but if you take all the words together then he may, for the words the testator has used are plain, certain, and well known in law, to describe the person the testator manifestly intended should take by them.

2. The second thing requisite to make a perfect description is, that it be certain, and applicable to the thing described and no other. And this is so in the present case, for *Edward Barkham* is heir male of the body of the testator's great-grandfather, and no other person is so.

3. The third requisite is, that it be expressed in proper words. This is not always necessary in a will, but here they are proper even in the case of a will, for the words *heirs males of the body* are the proper, and indeed the only words that can be used, to distinguish that special heir, from the general heir. Sometimes the word *right* is used with *heirs*, but improperly in cases of this nature.

Thus you see all the things requisite to make a perfect, certain description, concur in this case; and therefore since it has been proved, and indeed cannot be denied, but that a man may take by any other good description as well as by name, it evidently follows that he may take by this.

Secondly, I come now to shew that the judicial authorities that a man may take as a purchaser by the words *heirs male of the body of J. S.* though he be not heir general, do greatly over ballance those that hold the contrary.

Vide Salk.

679.

Sir T. Jones

99.

1 Ventr. 334.

2 Lev. 232.

Raym. 330.

3 Keb. 830.

The first case I shall mention is that of *Burkett v. Durdant*, 2 *Ven.* 311. which was adjudged in the house of lords; and the case of *James v. Richardson* in *Pollexfen* 457. is the same. The case was thus: A man devised lands to *A.* for life, remainder to the heirs males of the body of *A.* now living, and for want of such issue remainder over; and it was resolved, that there passed an estate for life only to *A.* and that the remainder immediately vested in the heir male of the body of *A.* then living; because those words were a sufficient *designatio personae*, who was intended to take; and this is

is a stronger case than the present, because the ancestor being alive, he could not strictly speaking have any heir; but those words being used in common parlance to denote the person who would take as heir male, if the ancestor were dead, that was thought sufficient. As for the words *now living*, I do not think they were very considerable in that case, for they only shew that the testator intended, that some body who was then alive should take.

The case of *Long v. Beaumont*, which was decreed in the House of Lords, *Pas. 13 Ann.* has not these words *now living*, and yet ^{1 Will. Rep. 229.} *heir male of my aunt Long*, was adjudged a good description of the person that was to take, though the aunt was still living, and consequently he was neither heir nor heir male, nor was it certain he would be heir male of her body at the time of her death.

The case of *Pybus v. Mitford* was thus: (1 *Ven.* 372.) *Mich.* *Mitford* was seised of the lands in question, and had issue *Robert* by his first *venter*, and *Ralph* by *Jane* the second, and covenanted to stand seised to the use of his heirs males begotten of the body of his second wife; the question was, whether *Ralph* could take. The Judges, to support the intent of the party, raised a fine-spun notion of a resulting use, which indeed was very well laboured by them; but *Hale* in delivering his opinion insists upon the point now in question, and argued very strongly and clearly, that the words *heirs male of the body of J. S.* are good words of purchase; and puts the case of a gift to one and his heirs female of his body, and he has a son and a daughter, the daughter shall take. *Litt. sect. 22.* And by several other cases there quoted, he says it appears, that no regard is had whether the son be heir of the husband, if he be the heir of their two bodies; and then cites a case which was adjudged in Queen *Elizabeth's* time, which seems directly to the present question: A man had three daughters and a nephew, and he gives 2000 *l.* to his daughters, and his land to his heir male; provided, that if his daughters troubled his heir, then the devise of 2000 *l.* to them should be void; and it was adjudged that the limitation to his brother's son by the name of heir male was a good name of purchase; and says he, this agrees with *Counden* and *Clerk's* case, in *Hobart*.

These reasons and these authorities made so strong an impression upon Justice *Wild*, that he immediately declared himself convinced, and that he was of the same opinion with *Hale*; and for my part, I think they are sufficient to satisfy any reasonable man.

Trin. 8 W. 3. in C. B. rot. 1484. Baker v. Wall. J. S. by his will devised his lands "to *Daniel* my eldest son, and to my heirs
VOL. I. M "males

“ males for ever ; and if my heir should be a female, my said heir
 “ male shall pay my heir female 12 l. *per annum* out of my lands,
 “ I mean my heir male, for ever.” The testator died, and *Daniel*
 died, leaving issue one daughter only ; and it was resolved, that
John the brother of *Daniel* should take the estate by the descrip-
 tion of heir male of the testator, though the words of *his body*
 were not in ; but the testator’s intent appearing so plain, that an
 heir female should not hinder the next heir male from taking,
 they gave judgment for the male.

S. C. 2 Vern.
 729.

Upon the whole I am of opinion, that the words *heirs male of
 the body of his great grandfather* are good words of purchase, to
 pass the estate to him who is heir male, though not heir general.
 1. Because common sense, natural reason and understanding, and
 the manifest intent of the testator, call aloud for this justice. 2. Be-
 cause the legal authorities that are urged for the contrary opinion
 are of themselves but of very little weight. 3. Because the resolu-
 tions that have been in favour of this opinion, do greatly overbal-
 lance those of the other side.

The next inquiry is, how the trustees in this case shall execute
 their trust. And it must be observed, that though the testator di-
 rects the trustees, to convey the surplus to the heirs males, in the
 plural ; yet that is well pursued by conveying to the heir male in
 the singular number, and to his heirs male ; for so the legal sense of
 those words is, as was resolved in *Shelley’s* case. And it is most
 properly expressed in the plural number, because then the words
 denote both the person to take, and the estate to be taken. Let
 the conveyance be made to the person who is heir male of the body
 of the testator’s great grandfather, and the heirs male of the body of
 the great grandfather. In this I follow the law, which executes
 conditions executory as near as may be, where the words cannot be
 strictly pursued ; and a court of equity ought to execute trusts, as
 the courts of law do things executory.

Dominus Rex vers. Hunt & al’.

Mandamus.

THE court granted a *mandamus* on 1 Geo. c. 34. directed to
 the justices of the peace, to allow the defendants, being con-
 stables, the extraordinary charges in providing carriages on the late
 expedition into *Scotland*.

Dominus

Dominus Rex *vers.* Theed.

THE writ *de excommunicato capiendo* was in a suit *pro correctione morum* generally, and held to be ill on the authority of *Rex v. Gapp*, *Pas. 1 Geo.* which was in *quodam negotio pro reformatione et correctione morum*. *Excommunicato capiendo* may be superseded. *Salk. 294. Mod. Ca. 58.*

After the writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return the defendant moved and had it superseded; for the court said, they could judge of it by the entry, and since it appeared, the defendant could not be legally detained upon it if he was taken, it was proper to supersede it, to prevent the man's being restrained of his liberty contrary to law: That the intent of 5 *Eliz. c. 23.* which directs the writ to be delivered in open court, was to apprize the court of the nature of the cause; that this was now to be considered as a writ that *improvide emanavit*, and they were not to wait till the return, till all the inconveniences which they should have prevented by not issuing the writ had happened.

Dominus Rex *vers.* Eyre.

A *Scire facias* was brought to repeal the grant of a market to the defendant, suggesting that it was to the prejudice of the Duke of Rutland, who had a market within four miles. *Scire facias.*

Upon trial it was found *pro Rege* on the issue whether the grant was to the prejudice of the Duke; and on motion in arrest of judgment it was held to be a good issue, though the grant and not the *reuer* was found to be prejudicial.

Then it was objected, that the *scire facias* was brought in the late Queen's time, and by her demise the proceedings abated, this not being within 1 *E. 6. c. 7.* or 1 *Ann. c. 8.* To which it was answered and resolved by the court, that this is an original writ, and therefore within the general words. *Regist. 69.*

Dominus

Dominus Rex *vers.* Hamond.

*Communis
strata* and
alta via are
synonymous.

INDICTMENT for that the defendant *tali die anno et loco* ten loads of straw and dung in *communi strata sive alta regia via posuit et locavit et ibidem per decem dies remanere permisit, ita quod* the King's subjects could not pass.

On demurrer it was objected, that the place where the nuisance was committed should be certainly alledged, whereas here the indictment runs that it was laid in one place or another; and being disjoined by the *sive*, the court cannot take *communis strata*, and *alta regia via*, to be the same. 2 Roll. Abr. 80. pl. 4, 5.

To which it was answered and resolved by the court, That *strata* signifies the highway, and that these are two expressions to denote the same place. *Spelman verbo strata: Cowel's Interpreter, Streetward and Streetgavel.* So in the statute of *Marleberge*, which prohibits distresses in the highways, it is *Nulli liceat distractiones facere in via regia aut in communi strata*: In the glossary at the end of the *decem scriptores*, there is an account of some travellers who happened to lose their way; and the expression is, *a publicâ stratâ deviantes*, which must certainly mean the highway. The court therefore held it well enough.

Then exception was taken, that the *terminus a quo*, or *ad quem* the way led, was not mentioned. To which the court answered, that in indictments for nuisances in the highway it is not necessary; for the highway is infinite, and leads from sea to sea. *Latch* 183. 3 Keb. 89. *Rex v. Thompson*, 10 W. 3. There was judgment *pro Rege*.

Dominus Rex *vers.* Simpson.

A deer-stealer
may be con-
victed before
appearance, if
duly sum-
moned.

THE defendant was convicted upon the statute 3 & 4 W. & M. for deer-stealing; and the conviction set forth, that he had been summoned to appear before the justices; but it did not appear he ever was before them.

Exception was taken to this by *Reeve*, that as no appeal lies in this case, the justices should not have proceeded in the absence of the party, especially where it may end in a corporal punishment, as it may do here for want of a distress; and he cited *Salk.* 56, 400. and *Mawgridge's case* in *Kelyng*. And at another day (on consideration) *Parker C. J.* delivered the resolution of the court.

We are all of opinion, the offender may be convicted, without appearing. The statute is silent as to the method of proceeding, and the law of *England*, it is true, in point of natural justice, always requires the party charged with any offence to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default: Were it otherwise, every criminal might avoid conviction. The law being so, the magistrate is bound to give some opportunity to the party to appear, and if upon such notice he neither comes nor sends a sufficient excuse, the magistrate may proceed to judgment. If this was not to be allowed, the consequence would be, that the offender would escape unpunished, because he would never appear purposely to be convicted, and that would be to make the execution of the law depend on the will of the offender.

Salk. 181.
1 Mod. Ca.
41.

The rule of law that has been objected is true, That acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law. In the case of high treason (which is a much harder case than this) the party may be outlawed for his not appearing, and then he is liable to all the pains and penalties, as much as in the case of a conviction. So in real actions if the tenant makes a second default, judgment peremptory is given for the demandant to recover. In crimes of a lesser nature than treason or felony, and in personal actions, the outlawry exposes the party to greater punishment than if he had appeared and been condemned in that action; for he forfeits thereby his liberty, goods and chattels, besides other disabilities which he incurs. In corporations if a member of the body be summoned, and do not appear, he may lawfully be removed. 1 *Ven.* 19. 2 *Keb.* 488. 1 *Sid.* 14. 2 *Sid.* 97.

It is the constant practice in this court, in setting aside judgments, granting attachments, &c. to give notice to the party to come and make his defence, and if he neglects to make his defence, the court proceeds against him.

This act of parliament plainly designed a summary proceeding, and therefore the proceedings must be guided according to the summary proceedings allowed in this court. The solemn proceedings of the law before a man shall lose his life or lands need not be followed; and yet in those cases the judgment is, that he shall forfeit his life or lands, not for the crime as taken *pro confesso*, but the judgment is really for his absence. The proceedings therefore against a man in his absence are not against the common law. Many acts of parliament that appoint a forfeiture or penalty, do not give the

justices power to bring the offender before them. There are many offences against acts of parliament, which are mere nonfeasances or neglects, as not putting out of lights, &c. Now to require the offender to be brought before the justices and detained, will be a strange construction, for that detainer may be accounted a greater punishment than the forfeiture; and if in such a case the offender, to prevent further trouble, would send the forfeiture, why should not that be a sufficient authority for the justice to convict him, though he does not appear in person? To compel the offender to appear would be to no purpose; for if he does appear, the justices cannot compel him to make a defence.

An objection was made to the summons, that it does not particularize the place and hour, it is only *licet summonitus fuit ad hoc tempus et hunc locum, sed default fecit*. (Answer) The default entered by the justices implies the summons was to appear at that time and place, for otherwise it would not be a default; and where the legislature has given a power, we will presume the justices pursue that power, unless the contrary appears. If they did not make a proper summons, they are punishable for it by information. *Post, Rex v. Allington, Hil. 12 Geo.*

An attorney in these cases may be made to defend.

As for the other order of conviction, whereby it appears the defendant made an attorney to defend for him; we think that is certainly good, for the offender may intrust his defence with another, and the justices cannot enforce him to appear in person. Orders confirmed.

Brampton and Crabb.

After the inquest is taken by default, the defendant can make no suggestion on the roll.

AFTER a verdict for the plaintiff in an *indebitatus assumpsit*, and 22 shillings damages assessed, the defendant came into court, and suggested upon the roll "*quod querens nulla misas et custagia versus ipsum in hoc casu super veredictum illud reciperare debet, sed humillime petit idem defendens quod misae et custagia sua per ipsum circa defensionem suam in hac parte expensa per judicium hujus curiae juxta formam statuti sibi adjudicentur, quia dicit quod*," (setting out the act of 3 Jac. 1. c. 15. made for the recovery of small debts in the city of London, and which subjects the plaintiff to lose his costs, and pay costs, where the parties are citizens, and the damages under 40 shillings). Then the defendant avers, that at the time of making the promises in the declaration, *et semper abinde hucusque*, he was and is a free-man of the city of London, residing within the city, (*viz.* in such a parish and ward) using the trade of a cooper, and that the plaintiff

was and is a freeman residing within the city, viz. &c. using the trade of a barber, and that the cause of action arose within the jurisdiction of the court of conscience, which was held every *Wednesday* and *Saturday* every week since the time of the promise. He likewise avers, that he was indebted to the plaintiff in no more than 22 shillings, and that he has expended so much in his defence, which the plaintiff ought to pay, *juxta formam statuti praed'*.

The first doubt upon this suggestion was, whether the defendant should not have made it before the cause had so far proceeded as to a verdict, and whether it was not a matter pleadable to the jurisdiction of the court: But upon citing a case of *Pennel v. Wallis*, in *B. R. Mich. 9 W. 3.* where after verdict for 30 shillings, the defendant made such a suggestion, which was argued on demurrer, and held to be well suggested after a verdict, this first difficulty was got over.

But then it was objected, that it appeared the inquest was taken by default, and therefore the defendant was out of court as to all purposes but having judgment against him. After a default there can be no repleader. *Salk. 216. 1 Mod. Ca. 1. Salk. 579. 2 Roll. Abr. 430. pl. 4.*

For this last reason the court held, that the defendant could not be received to make the suggestion, and so the plaintiff had judgment.

Easter

Easter Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice*:

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

Dominus Rex *vers.* Barnes.

The sessions cannot set aside the assignment of an apprentice bound out by the justices.

A. Is bound out by the justices to *B.* who assigns him to *C.* and the sessions, reciting the special matter, adjudge the assignment void, and order him to be returned to *B.*

Per Curiam: The sessions had no power to judge of the validity of a deed, or to hinder a man from assigning his apprentice. The covenant to provide for him is well performed, if the person to whom he is bound assigns him to another to provide for him. And apprentices bound out by justices may be assigned as well as others. Wherefore the order was quashed.

Freshwater *vers.* Eaton.

SCIRE facias on a recognizance in the marshal's court, to surrender the principal to the gaoler of the palace court, if he should be condemned. Error of that judgment, and affirmance, and upon that the bail rendered the principal to the *King's Bench*, the whole proceedings being removed thither.

On a recognizance to render in an inferior court, if the proceedings are removed into B. R. the render may be there.

Whitaker Serjeant insisted, that this is no performance of the condition.

C. J. Upon the surrender to the marshal's court, *non constat* to the officer that there is any charge against him there, and by that means he will be discharged; and if he be surrendered there he must be removed to this court; it will therefore be least trouble, to surrender him here.

Eyre J. The render ought to be where it will be most effectual.

Pratt, J. A condition to re-enseoff is performed by lease and release, *Co. Lit.* 207. a. 1 *Rol. Abr.* 426. *Carter* 88. *Plowd.* 7. a. 156. b. Condition to pay money is performed by causing it to be paid. The intent of the condition in this case is answered by the defendant's being in prison to answer the plaintiff's demand; and many cases of conditions there are, where the law has never required a strict performance according to the letter of the condition, provided the intent of the condition be answered.

Per Curiam: The render is good, and a good performance of the condition.

Dominus Rex *vers.* Poland.

CHESHYRE Serjeant moved for treble costs against the prosecutor of an indictment against the defendant for using the trade of a glover, upon an affidavit that he was a soldier, and disbanded upon the peace of *Ryswicke*, by virtue of the statute 10 & 11 W. 3. c. 11. which enacts, "That the soldiers time shall be taken as if actually served, and if they be indicted they shall be acquitted on the general issue, and recover treble costs."

Where treble costs are to be recovered against a prosecutor for a matter not appearing on the *Poslea*, the Court will give leave to suggest the special matter.

Hill. 5 G. 2.
in B.R. *Cathedral v. Cooper*
& al', where
defendants
were sued as
acting under
the *Kensington*
turnpike act
12 G. 1. c. 37.
and acquitted,
they were al-
lowed to make
the like sug-
gestion.

The doubt in this case was, how these costs should be come at, whether by rule of court upon the *affidavit*, or by a suggestion of the matter upon the record; and for this purpose he quoted the case of *Walker v. Sir Philip Egerton*, Hilary 7 W. 3. There the defendant was collector of the land-tax, and the plaintiff being doubly taxed as a non-juror, and distrained, brought an *Indebitatus assumpsit* against the collector for the redemption-money. And though nothing of this appeared upon record, yet on affidavits of the fact the court directed a suggestion to be made, "*Quia constat curiae super examinationem quod, &c. ideo consideratum est* that the nonsuit be recorded, and the defendant recover treble costs.

Bateman v. Wallis, Trin. 9 W. 3. in B. R. rot. 588. That was an *Indebitatus assumpsit* for a cause arising in *Newcastle*, and a verdict under 40 s. The custom of *Newcastle* was suggested, that the plaintiff should not recover, but pay costs; and so was the case of *Brampton v. Crabb*, Hil. 3 Geo. Upon the authority of which cases the court ordered a suggestion to be made, not *quod constat curiae super examinationem*, but *quod constat curiae super sacramentum duorum credibilium testium quod, &c.* and then award the costs. Vide 2 Vent. 45. contra.

Woodcock and Elpington.

How the penalty against the marshal on 8 & 9 W. 3. c. 26. shall be recovered.

DARNALL Serjeant moved for a rule for 50*l.* against the marshal upon the statute 8 & 9 W. 3. c. 26. for not giving a note testifying the defendant's being in his custody.

Per Curiam: The statute does not give us any power, it only says 50*l.* shall be forfeited. This neglect is a contempt to the court, and therefore the marshal may be punished as used to be before this statute. You had a rule for him to own his prisoner, if he did not the court punished him to the plaintiff's satisfaction. The statute does not preclude us from punishing him, but only gives the plaintiff the 50*l.* as a further satisfaction. The penalty may be recovered by bill against the marshal, but it is not in our power to make him pay it in a summary way. The chief intent of the statute was, that such note from the marshal should be good evidence in case of an escape, to prove that the defendant was at that time in actual custody. Take a rule for the marshal to acknowledge his prisoner.

Dominus Rex *vers.* The inhabitants of St. Olaves Jury.

A. Is bound to *B.* a cobbler, who keeps a stall in one parish, lies in another, and the boy in a third, and the sessions adjudge the settlement where the stall is, because the service was there. Cobbler's stall no inhabitancy to gain a settlement.

Per Curiam: The boy has gained no settlement in either of the three parishes, for the stall is not sufficient to give him one, the master lying in another parish. Order quashed.

Between the parishes of St. Andrew and St. Brides.

ORDER of Sessions for the removal of a wife and three children from the parish of *St. Andrew* to the parish of *St. Brides*, setting forth, that *A.* about twenty-three years since married *B.* and lived with her five years in the parish of *St. Brides*, and had by her four children, two whereof were dead, and the other two provided for. That at the end of five years he went away from her, and married another woman, with whom he lived somewhere in *England*; but that he never saw his first wife *B.* from the time of his going away. When a wife marries a second husband, and it is found the first had no access to her for a long time, the children of the second marriage are bastards, and the wife's settlement where the first husband's was.

B. after the separation (having heard nothing for a long time of *A.*) married a second husband, by whom she had eight children in the parish of *St. Andrew*, who all went by the name of the second husband, five of them are dead, and the other three survive. And the sessions presuming that the second marriage of the wife is void *ab initio*, adjudge, that her settlement, and that of the three children, is in the parish of *St. Brides*, where the first husband lived, as deeming the children the legitimate issue of the first marriage.

The court quashed the order as to the children, and confirmed it as to the wife.

First, Because the second marriage and living with the second husband in *St. Andrew's* was void *ab initio*; and therefore the place of her settlement was where the first husband lived.

Secondly, It being adjudged that the first husband had no access for seventeen years, no presumption shall be admitted but that these are the children of the second marriage; and they not being born in the parish of *St. Brides*, nor having ever inhabited there forty days, can have no settlement in *St. Brides*.

I Roll.

1 Roll. Abr. 358 pl. 1. 8. pl. 4. 5. Bract. lib. 5. fol. 417. Co. Litt. 123. b. 2 Roll. Abr. 356. Cro. Jac. 541. Fleta, lib. 1. c. 15. 4, 5. Bracton, lib. 1. c. 9. 4. Co. Litt. 244. a. Salk. 123, 483. 7 H. 4. 9. All which cases were quoted to prove, that improbability will bastardize the issue, and therefore it was argued *a fortiori*, that impossibility, which was found in this case, would bastardize also.

Dominus Rex *vers.* Foley and Harley.

Trial at bar granted upon consideration of the consequences of a conviction upon an information.

INformation for taking 3 s. 4 d. for registering a warrant of attorney, contrary to the lottery-act, which says, it shall be entred without fee or reward, and all persons offending shall be incapable to hold any place.

The defendants moved that they might have a trial at bar; for though the question seemed very short, whether they took the fee or not; yet the consequence was very considerable, the defendants are auditors for life, and that is a freehold of which they will be divested by a conviction upon this information. *Pasch. 9 Annae Regina v. Harcourt, Scire facias* to repeal letters patents, and there a trial at bar was had. *Sid. 420.* The crown it is true may sue any where, but when they have commenced their suit, it is in the power of the court.

On the other side it was insisted, that the court could not take notice of what would be the consequences of a conviction; that the question was short, and the *onus probandi* upon the crown, who might try it where they pleased.

Powers, Eyre and Pratt, were for a trial at bar; but the chief justice said the defendants ought not to pray a trial at bar in an issuable term. A trial at bar was granted for next term.

Stutter *vers.* Freston. In C. B.

Churchwardens.

PROhibition was granted to the spiritual court, where it was libelled against the defendant, for not appearing to take upon him the office of churchwarden, though thereunto appointed by the ordinary. And it was held, that though the parishioners and parson neglect for ever so long to chuse churchwardens, yet the ordinary has no jurisdiction; for churchwardens were a corporation at common law, and they are different from questmen, who were the crea-
tures

tures of the reformation, and came in by canon law. The 89th and 90th canons say that churchwardens shall be chosen by the parson and parishioners, and if they disagree, then one by the parson and the other by the parishioners, *et alioquin non erunt*. *Per curiam*: The proper way is to take a *Mandamus e B. R.* 1 Ven. 115.

Denny *vers.* Ashwell. In C. B.

A Prohibition was denied to a suit in the spiritual court for marrying his wife's sister's daughter, though cases were quoted where such a marriage has been held lawful. *Moor* 907. *2 Keb.* 551. *1 Sid.* 434. *1 Mod.* 25. *2 Lev.* 254. *contra.* *2 Vent.* 12. Cannot marry wife's neice.

Sir Robert Salisbury Cotton *and* Davies. In B. R.

UPON *Non fuit electus* returned to a *Mandamus* to swear the plaintiff a capital burghess of *Denbigh*, the jury find a special verdict, That by the charters there are to be two bailiffs, two aldermen, and twenty-five capital burghesses; and the direction how the capital burghesses are to be elected is in these words: "And " if it happen any of the said capital burghesses to die, or be removed, then it shall be lawful for the bailiffs, aldermen and capital burghesses for the time being, or the major part of them, *Quorum unum ballivorum et unum aldermannorum duos esse volumus*, " to elect another." That 24 June 1 Geo. there was a vacancy by the death of J. S. and Michaelmas-day following the bailiffs, aldermen and burghesses met and proceeded to an election. That the two bailiffs and the major part of the capital burghesses gave their votes for the plaintiff, and the two aldermen and the residue of the capital burghesses voted for another. Where a power of election is vested in a set number, *quorum A. and B.* to be two, their presence only is requisite, and not their consent.

Lutwyche pro quer' argued, that the question in this case is only, whether upon the words of the clause, *Quorum unum ballivorum et unum aldermannorum duos esse volumus*, the consent of one bailiff and one alderman to every election be requisite, to make it good. And he took the negative of the question; and argued, that the charter only required their presence; for if it should be thought that the election cannot be without their consent, it would be in a manner to vest the whole power of election in them two; which the charter never intended. In the common case of a quarter sessions a justice of the *Quorum* must be one, but yet the act of the majority binds him. *1 Inst.* 250. *1 Roll. Abr.* 514. *Hob.* 211.

Chekyre Serjeant contra. Unless there be one bailiff and one alderman consenting, there can be no election. What signifies their presence, if they disavow the election? There is Serjeant *Whitaker's* case, *Hil. 3 Annae, Salk. 434.* By the charter of *Ipswich* power is given to the bailiffs, burgeses and commonalty to remove the recorder, *quorum* the two bailiffs *duos esse volumus.* Upon a *Mandamus* to restore Serjeant *Whitaker*, they return, that he was removed by the bailiffs, burgeses and commonalty, the two bailiffs being present; and it was objected and adjudged that their consent was as necessary as their presence. *3 Mod. 3.* If they are present and dissent, how can the election be said to be by them?

C. J. This is like the case of the city of *London*, where the mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the mayor dissents. In this case there is nothing required but the presence of one bailiff and one alderman at every election, and they have no negative voices; to which the rest of the court agreed, and a peremptory *Mandamus* was granted.

Newman *vers.* Holdmyfast. Mich. 3 Geo. rot. 194.

Ejectment lies
pro communia
pasturae gene-
rally, if joined
with other
lands.

Ejectment for lands, *acetiam pro communia pasturae.* And after verdict for the plaintiff, it was moved in arrest of judgment, that it ought to have been mentioned, what sort of common: because an ejectment will not lie for all sorts, such as common *pur cause de vicinage.* And that a commoner cannot maintain trespass, and much less an ejectment. And *Co. Litt. 4. b. Bro. Common 24. Trespass 213. Yel. 143. Cro. Car. 492. 1 Lev. 212.* were cited.

Sed per Curiam: After a Verdict it shall be intended to be such common for which an ejectment will lie, as common appendant or appurtenant. And the general expression of *Common* must relate to that which is most usual, just as the word *Tenure* imports a tenure in socage. Fines and recoveries are *de communia pasturae* generally. *1 Cro. 301. 3 Keb. 738. 1 Jon. 315. Mich. 1 Geo. Cave v. Hunt,* in the Exchequer chamber, this objection was over-ruled. He that has possession of the land has possession of the common, and the sheriff by giving possession of one, executes his writ as to the other.

N. B. This was not a motion in arrest of judgment, but came from C. B. by writ of error to B. R. where the judgment was affirmed.

Trinity Term

3 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice*.

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

Dominus Rex *vers.* Major', &c. Norwic'.

PAGE Serjeant moved for a *superfedeas* to a *mandamus* directed to the mayor, aldermen and common council, to go to the election of a town clerk, upon an *affidavit* that the writ was misdirected; for it was neither to the corporation by the corporate name, nor to the mayor and aldermen only, in whom the right of election was. And the court said, they would not expect a return to this writ, which was directed to the common council, who had no right, but grant a *superfedeas quia improvide emanavit*. But upon proposals of trying the right in a feigned issue, no *superfedeas* went.

When a *mandamus* is directed to those that have and those that have not a right, the court will *superfede* it.

Salk. 699, 701.

Dominus

Dominus Rex *vers.* Percivall & al'.

The sessions may by virtue of 43 Eliz. charge parishes out of the hundred towards the maintenance of the poor within that hundred, before two justices have adjudged that the hundred is not able.

Salk. 480.

Sessions has an original jurisdiction to discharge apprentices.

ORDER of sessions reciting, that the parish of *A.* is not able to maintain its own poor, nor any other parish within the hundred to contribute; therefore the justices at the sessions tax other parishes in another hundred within the same county to the relief of the poor of the parish of *A.*

Reeve moved to quash it, and insisted that the 43 *Eliz. c. 2. §. 3.* gives no authority to the sessions to charge people out of the hundred, till two justices have inquired whether any parish in the hundred can contribute. The first application to be to two justices, and the second to the sessions.

C. J. I do not see to what purpose it would be for the two justices to make an order, only to adjudge that no parish within the hundred is able to contribute. We will presume the sessions is satisfied of that, and if the two justices should make such an adjudication, yet the sessions must inquire into the truth of it; and if no order appears which charges any parish within the hundred, it is a sufficient ground for the sessions to act. This is like the case of apprentices bound out by justices: For there, if there be any disagreement, the master and servant may go before two justices to make an end between them, and if the justices cannot, then to the sessions: But yet it has never been held, but that the sessions has an original jurisdiction, and the parties are intitled to be heard at the sessions, tho' they never went before two justices. *Salk. 67, 68. 1 Ven. 174. Salk. 491.* In this case if the justices had charged any parish within the hundred, that would have stopped the sessions from proceeding; and the sufficiency of the hundred depends on this, whether two justices have ever charged the hundred. *If the two justices do not think the hundred able,* (that is) if they do not adjudge it so. If two justices should adjudge the hundred not able, yet if other two justices adjudge the contrary, their charge would be good, and the sessions be ousted of their jurisdiction notwithstanding the first adjudication.

Eyre J. Here are two jurisdictions, that of the two justices, and that of the sessions, and both are original jurisdictions. They are different in all respects, for the two justices have no power out of the hundred, nor the sessions within it. There need be no appeal from an adjudication of two justices, for that would be to appeal from a nullity. Order confirmed.

The

The Parishes of South Sydenham and Lamerton.

ORDER of two justices for the removal of *A.* and his wife from the parish of *Lamerton* to the parish of *South Sydenham*, wherein the case was specially stated, That about 27 years since the mother-in-law of *A.* dying, he entered into a term of years in *South Sydenham* in the right of his wife, and lived upon it two years, but never took out administration to the mother.

Taking an entire tenement of 10 l. per annum gains a settlement though it lies in two parishes; aliter of two distinct tenements making together 10 l. per annum in different parishes.

That at the end of two years he removed to *Lamerton*, and took a lease for 99 years, determinable upon three lives, at the yearly rent of 7 l. 10 s. whereof 4 l. 10 s. lay in *South Sydenham*, and the residue, and also the messuage, lay in *Lamerton*, where *A.* has lived for 25 years. That the premises were of the yearly value of 13 l. but in regard 7 l. 10 s. rent only was reserved, and 4 l. 10 s. of that lay in *South Sydenham*, and he had formerly lived there two years; therefore the justices adjudge the settlement to be there.

Glyde Serjeant moved to quash it, for a man may have a right to several settlements, and yet be settled in one only. The right of administration gave him no settlement in *South Sydenham*, for there must be an actual administration.

Reeve contra. The term is but a chattel, to which he is intitled without administration. The settlement was good at *South Sydenham*, but the question is, whether he has since gained any at *Lamerton*. The statute 13 & 14 Car. 2. c. 12. requires him to take a tenement of the yearly value of 10 l. what the value is, must be adjudged by the rent reserved, and that is only 7 l. 10 s.

C. J. If *Lamerton* be a good settlement, the order is wrong. The quantity of the rent is not material, but the value of the land. A tenant often pays a fine, and thereby lowers the rent, and yet the land is of equal value. And if a man should out of kindness settle another in a tenement of 10 l. per annum value, reserving no rent, yet that will not alter the case.

The only difficulty is, that there is not in this case 10 l. per annum in one single parish. As to that I am of opinion, that if such a person as this should take a tenement of 8 l. per annum in one parish, and another of 3 l. per annum in a different parish, that would not gain him a settlement in either; but if the tenement be intire, and the house in one parish (as this case is) and part of the land

Inter paroch. North Riffon and Wooton Underidge, Mich. 1 Geo. adjudged that taking two distinct tenements, both making up

VOL. I.

Q

10 l. per annum in the same parish, gives a settlement. Salk. 535.

in another ; yet this may properly be called a tenement of 10 *l. per annum* in that parish where the house is. The law presumes that a person capable to be entrusted with the management of 10 *l. per annum* is not likely to become chargeable ; but is able to maintain himself. Two distinct tenements in two parishes, making together 10 *l. per annum*, will give no settlement. But it seems to me to be otherwise where the tenement is intire.

Eyre J. accord.

Pratt J. This man has fully satisfied the words of the act of Parliament. The mischief was, that the poor went to the parishes where were the best common and privileges ; and when they had consumed that, removed to another. The only way to remedy this was, to send them back again. Though part of the 10 *l. per annum* lies in one parish, and part in another, yet the man is not a whit the poorer, or less able to provide for himself. There are considerable farmers who do not rent 10 *l. per annum* in any one parish, and it would be hard to adjudge that therefore they gain no settlement.

Per Curiam : The settlement is at *Lamerton*, and therefore the order of removal to *South Sydenham* must be quashed.

Dominus Rex *vers.* Ballivos de Morpeth.

Mandamus lies to restore a school-master of a grammar school founded by the crown.

MANDAMUS to restore *A.* to the office of under school-master of a grammar school at *Morpeth*, *vel causam nobis significetis :* And the writ sets forth, that King *Edward* the sixth founded this school, and appointed that there should be two masters and an usher *imperpetuum*.

Return, that at the time of publishing the act *primo* of his Majesty's reign the said *A.* was under school-master, and that he never took the oaths by the act appointed to be taken ; *ratione cujus* he became incapable, and therefore they cannot restore him.

Lutwyche. This is an improper return. The writ suggests a possession and expulsion, and therefore they ought to lay the reasons of turning him out before the court. There does not so much as a power of turning him out appear.

Bootle contra. The writ does not command them to shew cause why they turned him out, but only to restore him, or shew cause. By the words of the statute he is *ipso facto* deprived upon a neglect to

to take the oaths, so no formal expulsion was requisite. *Show.* 274.
4 *Mod.* 52.

A *mandamus* does not lie in this case. *Mandamus's* are granted to restore people to publick offices, where the administration of justice is concerned; and if the place be a freehold, the party aggrieved may have an affize; if of a lesser nature, an action for the special damage. *Mich. 2 Ann. Vaughan's case.* A *mandamus* to restore him to the office of prover of guns in the *Tower* was denied, because of a private nature: And *Holt C. J.* said, a *mandamus* would not lie to restore a register of an ecclesiastical court. *Show.* 252. 3 *Mod.* 335. *Show.* 217, 261, 251. *Mandamus* denied for a proctor of *Doctors Commons.* And in 1 *Sid.* 169. for a steward of a court baron; and in *Stiles* 458. for an usher. 1 *Sid.* 40, 29, 71. 1 *Keb.* 5. and in *Show.* 74. for a fellow of a college. *Vide* 1 *Ven.* 143.

Lutwyche replied. Though it may not lie for a master of a private school; yet it will for this, which is a free grammar school founded by the crown. The education of youth concerns the publick, and therefore the masters are required to take the oaths. A *mandamus* was granted for the clerk of *St. Dunstan's*; and in 1 *Ven.* 143, 153. for a sexton and scavenger. And it will be no answer to say, that an affize or an action may be brought; for the court grants *mandamus's* every day for freeholds, and the party has his election which remedy to take.

Mandamus lies for a parish clerk, sexton and scavenger, for clerk of the peace. *Show.* 282. 2 *Sid.* 112.

C. J. This is of a publick nature, being derived from the crown. I think the defendants were not obliged to shew cause why they turn him out, but only why they do not restore him. But still this return is insufficient: It is only that he did not take the oaths *in actu praed' mentionat'*; now he is not obliged to take the *Scotch* oath. They should have said, that he did not take the oaths of allegiance, abjuration and supremacy, or the oaths required to be taken by a school-master. The act excepts officers in the *Fleet*, &c. and therefore it should appear he is not excepted: For the party having no opportunity to plead in this case, the return ought to be certain to every intent. And though we grant a peremptory *mandamus*, that will not be final; for if he has not qualified himself, he is *ipso facto* deprived, and our granting a *mandamus* will have no effect.

Show. 365.

Eyre J. All that is set forth in this return may be true, and yet this man no ways disqualified. In the case of a parish clerk we granted a *mandamus* upon solemn debate. A peremptory *mandamus* was granted.

Kitson

Kitson and Fagg.

Under-sheriff's clerk cannot assign a bail-bond.

UPON a case at the assizes the question was, whether a bail-bond was well assigned by the under-sheriff's clerk.

Parker C. J. said, he had had the advice of all his brothers, and they were of opinion, that an under-sheriff himself might assign a bail-bond in the name of the high-sheriff, it having been the constant practice ever since the statute 4 & 5 *Ann.* but that if the assignment was neither by the high-sheriff nor his under-sheriff, it would not be good; and that being the present case, the defendant had judgment.

Parishes of St. Mary Colechurch and Radcliffe.

Apprentice gains a settlement where he lies.

A. Is bound apprentice to a seafaring man, and served him for a quarter of a year in the day-time on land, in the parish of *St. Mary Colechurch*, but lay every night on shipboard in *Radcliffe*. But the justices apprehending the settlement to be where the service was, send him thither.

Ante 51.

Corbett moved to quash this order; and likened it to the case of the cobbler last term.

F. N. B. 160.
b.
2 Inst. 122.

C. J. A man properly inhabits where he lies; as in the case where the house is in two leets, he is to be summoned to that in which his bed is. Order quashed.

Croffier and Ogleby.

Goods taken in intestate's life and kept till his death, though used afterwards, is a trover and conversion in the intestate's life.

TROVER by an administrator for rum taken and converted in the intestate's life. Upon evidence it appeared, that the rum was taken in the intestate's life, but not used till after his death. And the question was, whether this evidence of not using it till the administrator's time would not overthrow the declaration of a conversion in the intestate's life.

Sed per Curiam: The time of using the rum lay in the breast of the defendant, who ought to have disclosed that matter by his plea: And the taking it in the life of the intestate, and keeping it till his death, is a trover and conversion sufficient to maintain this declaration. Wherefore the plaintiff had judgment, this being a point reserved at *nisi prius*.

Dryer *vers.* Mills & al'.

At nisi prius in Middlesex, coram Parker C. J.

TRESPASS for taking materials of a house; Not guilty pleaded; and the C. J. would not admit the defendant to give evidence of taking the goods as a deodand, because he might have justified, and then the plaintiff would have had an opportunity to give an answer to it.

On Not guilty cannot give evidence of taking the goods as a deodand.
Vide Co. Lit.
53. a. 283.

Dix *vers.* Brookes.

THE plaintiff declares, that the defendant broke and entered his house, and assaulted his wife. After verdict for the plaintiff it was moved in arrest of judgment, that the wife should have joined in this action, and by her not joining the defendant pays damages to the husband, and yet the action for the assault will survive to the wife, and so the defendant be doubly charged. Besides, that here is no laying *per quod consortium amisit*, to intitle the *baron* only to sue and exclude the wife. *Yelv.* 89. *Godb.* 369.

Baron may bring trespass for entering his house and beating his wife.

Econtra it was insisted, that the breaking and entering the house was the cause of action, and the beating the wife alleged only in aggravation of damages: And if that had not been alleged, it might have been given in evidence under the *alia enormia*. 1 *Keb.* 787. 1 *Sid.* 225. 2 *Cro.* 664. 1 *Mod. Ca.* 127. *Salk.* 119, 642.

Et per Curiam: The plaintiff may join that in his declaration to aggravate damages, for which he singly could not recover, and the party injured have his separate action. As in the common case of trespass for beating a servant, *per quod servitium amisit*; both master and servant may recover. And in the case of *Newnam v. Smith* it was held, that the plaintiff might allege the beating his daughter in aggravation of damages. *Salk.* 642. The plaintiff had judgment.

Dominus Rex *vers.* Episcopum Miden. in Hibernia.

Intr. Trin. 12 Ann. rot. 290.

The statutes of
jeofails extend
to suits by the
crown in
quare impedit.

IN a *quare impedit* brought by the crown, the original writ was returnable at a general return, and the *venire* at a day certain; and it was insisted to be error, because throughout the cause the process should be uniform.

Sed per Curiam: This is not a discontinuance, but a miscontinuance; which is helped by 32 *H. 8. c. 30.* and though the King is a party, yet in these his civil suits the statutes of jeofails extend to the crown. The judgment was affirmed.

Michaelmas

Michaelmas Term

4 Georgii Regis. In B. R.

Thomas *Lord* Parker, *Chief Justice*:

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

Anonymous.

THE court refused to grant a *Mandamus* to justices, to make *Mandamus*, a rate, to reimburse two of the inhabitants their charges in defence of an indictment for not repairing a bridge.

Cork *vers.* Baker. Ante 34.

THE defendant having brought a writ of error of a judgment in *C. B.* assigned for error a *Clausum fregit* original, and took out a *Certiorari* to verify his errors. The *Custos brevium* of the common pleas, instead of certifying the original, returned that there was such a writ in his office, but that the plaintiff in the original action, having entered a *Ne recipiatur*, he could not file the original, and consequently could not return it.

Upon

Upon this the plaintiff in error applied to this court. And a rule was made, for Mr. *Yates*, the deputy *Custos brevium*, to attend. And after counsel had been heard on both sides the court delivered their opinions.

C. J. This practice of entering a *Ne recipiatur* is very new, and in my opinion very absurd. There may indeed be some colour to say, that if the plaintiff neglects to file his original in order to warrant his judgment, that then the defendant may stop the filing it; but that reason will not hold in this case, which is a *Ne recipiatur* entered by the plaintiff against filing his own writ, after he has had the benefit of it, by intitling that court to hold plea, and convene the defendant before them. Their authority is grounded only on the king's writ out of chancery, except they proceed by way of privilege. And the statute which helps want of an original, never intended they should proceed without; but only went upon a supposition, that there had been one, which was lost; and therefore in all those cases where want of an original is helped, yet a bad original is not. 1 *Sid.* 84. *Yelv.* 109. 5 *Co.* 37. b. *Salk.* 267. If this practice was to prevail, no bad originals would ever be filed, but judgments be affirmed upon presumption the original is lost, when in truth there never was a good original at all.

Matter of fact relating to the proceedings must be fairly laid before the court that has power to examine into those proceedings; and we will make the filazer, or the plaintiff, carry in and file the original, rather than the party shall not have justice done him; or withdraw the *Ne recipiatur*, if that was of any effect. When a writ is in the *Custos brevium's* office, it is filed in judgment of law, though the officer does not annex it to the bundle of writs. It is an unreasonable position, that as soon as the plaintiff has had the benefit of the writ, he should be suffered to stifle it. Every defendant has a right to reverse an erroneous judgment; and he that takes upon him to obstruct that, is guilty of a very great abuse; and in my opinion ought to be punished.

Powys J. To deny the means is to deny the thing.

Eyre J. The court having power to redress, has as incident thereto, a power to come at every thing which is necessary for their information. And the officers of C. B. are *pro hac vice* officers of this court; and we will not pray in aid of the common pleas, to make the officer do his duty. His return amounts to no more than this. He says the writ is not filed; why? Because I do not do it; though I am paid for it, and it is my duty to do it.

Pratt J. The proceedings of the two courts seem to clash, and I shall always be very ready to pay a due respect to the court of common pleas. But that will never carry me so far, as to compliment them with our jurisdiction. And in cases where that comes in question, I think a man ought not to be mealy-mouthed, and in vindicating our own jurisdiction, we only act up to the rules of law and our own oaths. This court is superior to the court of common pleas, and they ought not to have laid an inhibition upon the officer, from filing this writ. When we are told, there is error in the proceedings, we must make all proper inquiries; and the party has a right to demand it of us. And when we issue a *Certiorari*, to return up this original; shall the officer say, there is such an one, but I will not file it? And can it be expected, that we shall stand still, till the truth of this is falsified in an action for a false return? Mr. *Yates* has endeavoured to trip up the heels of our jurisdiction, and therefore ought to be committed, unless he obeys immediately.

Mr. *Yates* refusing to alter the return, was committed. He immediately applied to the common pleas for a *Habeas corpus*, which being carried, the return was read, that he was committed by the court of *B. R.* *pro contemptu*. And then *Cheshyre* moved, that the return might be filed; which being done, he moved, that Mr. *Yates* might be discharged; and argued, that the commitment was too general, for that some cause of commitment must appear, to restrain a subject of *England* of his liberty. It is not so much as said to be a contempt upon confession, verdict, or examination.

2 Ven. 22.
Habeas corpus
returnable in
C. B. Carter
221.

Secondly, The time should appear. For it might be before the act of grace; and returns must contain certainty in themselves, because they are not traversable.

Pengelly quoted *Bushe's* case in *Vaughan*. 1 *Roll. Rep.* 119, 192, 220, 245. *Moor* 840. *Carter* 221. And argued, that though it is said, the defendant *praesens hic in curia committitur*; yet that doth not infer, that due examination was had.

Vide Lord
Shaftesbury's
case, 2 vol.
Trials 62.

Whereupon the court took time to consider, and look into the cases; and in the mean time the parties made an end of the cause, and applied to *B. R.* for leave to enter a *Nolle prosequi*, which was granted. And then a motion was made, that Mr. *Yates* might be discharged, which upon consent, and intercession of the prosecutor, and an affidavit of his indisposition, and setting a small fine upon him, was granted. But the *C. J.* said, that if Mr. *Yates* had been there, he should have told him, that he must not think of giving such shuffling answers to the king's writ of *Certiorari*; and that this

court has power, if their commitments are questioned, to justify their own proceedings.

Dominus Rex vers. Marriott.

Conviction
for killing a
hare, ill, *quia*
the witness
swears gene-
rally a man is
not qualified.

CONviction before one justice for keeping a greyhound; reciting, that one *William Toun* came and informed, that the defendant, being a person *not qualified* to keep a greyhound, did nevertheless keep one at *A.* and another at *B.* and with them killed one hare at *A.* and two at *B.* and that he being summoned did appear, and being asked what he had to say, offered nothing in excuse, and *ideo* the justice convicted him.

Pengelly Serjeant objected, that the justice should set out, why the defendant is not a qualified person, as that he is not the son of an esquire, nor has 100 *l. per annum* in his own or his wife's right. For he ought not to make himself the sole judge, but give the reasons at large. *West precedents tit. Indictments, §. 129. page 145. §. 270. page 147. §. 298. 1 Saund. 262.*

Reeve contra. The conviction has pursued the words of the act, in saying the defendant *not being qualified* did so and so. The cases quoted are upon statutes where the express qualifications are mentioned, but the statute 5 *Annae, c. 14.* which gives the penalty, says only, "not being qualified according to the statute 22 & 23 *Car. 2. c. 25.*" The defendant at the time of the conviction might have shewn himself qualified, for there the affirmative lies.

In orders of removal it is sufficient to say, the person came to settle contrary to law, without adding, "not having 100 *l. per annum, &c.*" though those are the qualifications required by the statute; and an order is as much a judgment as this, and the same reason holds in both cases.

Pengelly. The statute 22 & 23 *Car. 2.* limits the qualifications, and 5 *Annae* the penalty; and both these must be considered together as one act. For where one statute makes the offence, and another inflicts the punishment; it ought to appear, that the proceedings tally with both. *Plowd. 206. Allen 49. Cro. Eliz. 750.* This case differs from that of an order, for there an appeal lies, but here the judgment is final.

Plow. 51. a. b. The chief justice seemed to think the conviction would be good, having followed the words of 5 *Annae*, and that if the defendant was qualified, he ought to have shewn it before the justice, being summoned

summoned for that purpose. But then *Eyre J.* started an objection, that it was not the justice that had taken upon him to say the defendant was not qualified, but only the witness, for the conviction runs, that the witnesses being sworn, “*dicunt et jurant et uterque eorum dicit et jurat quod defendens existens persona minimè qualificat*” did such a day keep a greyhound;” so that it appears, the witness has given the law to the justice, and takes upon himself to judge of the defendant’s qualifications, and the justice is only made use of as an instrument, to reduce the opinion of the witness into a conviction.

C. J. The *existens, &c.* should be the conclusion of the justice, and not the words of the witness; for he ought not to swear generally a man is not qualified, and such a general proof will not be good. This is only an invention, to support a conviction in general terms, which would be bad if the particular facts were alleged.

Pratt J. Where the justices have a summary jurisdiction, and no appeal lies (as in this case) we must keep them up strictly to the law; and I should be glad if we could make them set out the whole particularly. But in this case I think it cannot be understood, that the *existens, &c.* are the words of the witness, for it cannot be supposed that he swore in *Latin*, and therefore I look upon this as the substance of the evidence reduced by the justice into form. If words are set out in *English*, we keep the witness strictly to the words; but where they are turned into *Latin*, if the substance and effect of them be proved, it is sufficient.

C. J. If ye render it in *English*, it is no more, than that the witnesses swore, that the defendant, not being a person qualified according to law, kept a greyhound. And we cannot intend, they swore negatively to every qualification. If any one of the qualifications had been omitted, the conviction would have been bad; and so it will be, when all are omitted. This is a record that the witness upon oath deposed so and so. I have seen all the qualifications negatively recited in orders of removal.

Eyre J. *Rex v. Green*, a conviction was quashed, where the witness deposed *de veritate praemissorum*. In *English* depositions the effect is only set out, that the witness swore that, *&c.* And though this is only the recital made by the commissioners, yet it is as large as the words of the witness; and we must intend this evidence was taken in the same manner. The witness here cannot be indicted for perjury, in swearing the defendant was not the son of an esquire, *&c.* because he has conceived the matter in such general terms. I do not see how he could honestly swear this; for I believe had he

Contra Salk.

369.

he been asked, as soon as he had said the defendant was not qualified, what the qualifications are, he could not have told you.

Adjournatur. And afterwards *Pengelly* mentioned two cases, *Regina v. Hayward*, *Pasch. 12 Annae.* There it was, "not being qualified, licensed or authorized to keep any engine, &c." and it was quashed. The other was the same term, and quashed, because no qualifications were mentioned. And towards the end of the term this conviction was quashed; and the principal reason declared to be, because the witnesses had taken upon themselves, to judge of the qualifications.

Jones *vers.* White.

Quaere, whether the coroner's inquest may be given in evidence in an action?

UPON a trial at bar on a feigned issue out of chancery, where the question was, *Devisavit vel non*; to overthrow the will, the defendant insisted, that the testator was *Non compos* at the time of making it, which was the 29th, having shot himself the 31st. And amongst other circumstances the coroner's inquest, which found him lunatick, was offered to be read. But being opposed by the other side, the court delivered their opinions.

C. J. The plaintiff in this case is executrix, and the inquest for her advantage, since the personal estate is saved by finding lunacy; and therefore I think it may be read against her. In my lord *Derby's* case an inquest *post mortem* was allowed to be given in evidence. If this be read, it will have very little weight, for it only finds him lunatick *eo instante*, 31st, which is no conclusive evidence, that he was so the 29th. *Powys J.* with the *C. J.*

1 Sid. 325.

Eyre J. This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment of battery cannot be read in an action for the same battery. An inquest *post mortem* was in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de se*.

Pratt J. If a verdict be given in evidence, it must be between the same parties; and therefore an indictment, which is at the suit of the king, cannot be read in an action, which is at the suit of the party. The wife is no witness here, as she was before the coroner; so that this would be to read her against herself. The reason why an inquest *post mortem* may be read is, because of the antiquity of it, or to prove a pedigree.

The

The court being divided, it was not read, till *Pratt* desired it might for this time, being only to inform the conscience of the Chancellor, and that nothing might be said to be wanting to clear this question.

Dominus Rex vers. Wakefield.

THE defendant was coroner of *Litchfield*, and as such took an inquisition *super visum corporis* of a man that hanged himself, whereby he was found *felo de se*. It fully appeared to the jury, that the man was lunatick; but the defendant, in order to cover the goods, told them that the finding him *felo de se* was only matter of course, with which they were contented, and found accordingly. Coming afterwards to be better informed, what the consequence would be; they applied to the coroner, and told him they were fully satisfied, the man was a lunatick, and desired he would take the verdict so: And thereupon he drew up the inquisition, and they all set their hands and seals to it. A *certiorari* being brought, he returned up the first inquisition, that he might still cover the goods; and the court stayed the filing it, and committed him. 2 *Sid.* 90, 101, 144. *Mich. 1 Geo. B. R. Rex v. Keddington*, the filing staid on the same account.

Coroner punished for ill practice.

Vide 1 Ven. 352. where such an inquisition was quashed; *sed quaere* how that could be, it not appearing on the record.

Dominus Rex vers. Vandeleer.

THE justices at the sessions order an apprentice, who had been ill used, and not provided for, to be discharged, and that the master having received 5 *l.* with him, should refund 3 *l.* as a further provision for him.

Justices cannot order money to be returned on discharge of an apprentice.

This was moved to be quashed, because the statute 5 *Eliz. c. 4. §. 35.* which gives the justices power to discharge apprentices upon complaint to them, gives them no authority to order any money to be returned.

Per Curiam: It is very hard, that if the master misuses his apprentice the next day after he is bound, he should pay back nothing if he is discharged. It will be an encouragement to masters, to treat their apprentices ill; but the statute being silent, the order must be quashed.

Salkeld 68. It was held, that the justices might order money to be returned, as a consequence of their power to discharge. *Ibid.* 67, 490.

Dominus Rex *vers.* Lewis.

Information.

AN information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simonaical. But the court refused to grant it, till he had been convicted of the simony.

Young *vers.* Holmes.*At nisi prius in Middlesex. B. R.*

On a devise of a term to an executor for life, he takes as executor and not as legatee without a special assent.

UPON Not guilty in ejectment the case was, That lessee for years, devises the term to the executor for life, paying 50 l. to J. S. remainder to the lessors of the plaintiff. The executor died, and his executrix entered upon the residue of the term, and possessed herself of the lease.

1. It being proved, the defendant had the lease in her custody, and refusing to produce it; an attorney who had read it was allowed to give evidence of the contents. And the C. J. said, he would intend it made against the defendant, it being in her power if it was otherwise to shew the contrary.

What is an assent.

2. For the defendant it was insisted and agreed to by the C. J. that *James Holmes* took the term as executor and not as legatee, and then the remainder over was not executed, and that it was incumbent on the remainder-men to prove a special assent thereto as to a legacy. Upon this they called a witness, to prove payment of the 50 l. charged upon the term in the hands of the legatee; and this was held a sufficient assent, and the plaintiff obtained a verdict. *Plow. 544. a. 8 Co. 95. a.*

Blewett *vers.* Bainard.

Hil. 3 Geo. rot. 519.

A juror withdrawn for a view may be sworn at the second trial. S. C. Comyns 248.

ON error from C. B. it was assigned, that *Abraham Saunders*, who on the first trial was withdrawn in order for a view, was sworn on the second panel: And *in nullo est erratum* pleaded.

The plea of *in nullo est erratum* was agreed to be a confession of the fact, and a demurrer to the matter of law: And at first the court

court inclined this was error, because it must be taken he was withdrawn as a person admitted by both parties to be improper to try the cause. But afterwards on consideration they held it to be right enough; and that if it was an exception, it should have been taken before he was sworn. But being withdrawn only for a view, they held it would be no objection, and affirmed the judgment.

Lord Kildare *vers.* Fisher.

Pass. 3 Geo. rot. 2.

ON error from *Ireland* in ejectment it was objected, that it was brought (*inter al'*) for 100 acres of mountain, which is a description of the situation, and not the quality of the land. And Ejectment lies for mountain in Ireland. 11 Co. 55. 2 Roll. Rep. 166, 189. Palm. 100. Hardr. 58. were cited.

Econtra. It was insisted, that ejectments have been held to lie for that in *Ireland*, which is not a known description here; as for *Bog*, 1 Cro. 511. 2 Keb. 745. Pass. 3 Ann. *Hind v. Hancock*. Ejectment in *Ireland* for a knave of land was held well, on certificate from thence, that it was a term used there.

After the cause had been adjourned, the C. J. delivered the opinion of the court. I have looked into the case of *Stafford v. Macdonolph*, in Palm. 100. and 2 Roll. Rep. 166, 189. which Rolle never transcribed into his abridgment. He being at that time the experter reporter, has given the fullest account, and is chiefly to be regarded. For that case is 17 Jac. 1. and Palmer was not attorney general till King Charles the Second's Restoration, (1 Sid. 465.) and must be very young, when that case was adjudged. There it is admitted, that a *praecipe* would lie *de stagno*, of a carve, and an ox-gang; *a fortiori* will an ejectment, which requires rather less certainty than a *praecipe*. They were inclined however to be guided by the opinion that had prevailed in *Ireland*, and therefore referred it to two who had been Judges in *Ireland*, and desired them to consult Sir William Parsons, and upon his authority they certified, that the word *mountain* in the general acceptation was used to denote the situation and not the quality of the land, and upon that the judgment was reversed. This case did not give us any satisfaction; though we agreed with the Judges to be guided by the sense of the *Irish*, yet we have not thought fit to take the same method: And have therefore propounded to them several questions, which are answered by the Chancellor, the two Chief Justices, the Chief Baron, and four other of the Judges. And I have since shewed it to

two

two of the Judges, who were here in the vacation, and they concur with the rest.

1. The first question we propounded to them was, whether in demand the word *mountain* is understood to describe the quality of the land, or only the situation?

To this they answer: That it describes both, and is a sort of coarse land that yields little or no profit. For the *English* upon their settling there, called such land as they improved *arable*, and the uncultivated part went by the name of *mountain*. And the Lord Chancellor adds, that it does not so much as necessarily include the situation, for he has a great deal of coarse land which is called *mountain*, and yet does not lie upon a hill, but is as low as the *arable* land about it, and that a boy can distinguish which is *arable* and which is *mountain*.

2. Whether fines and recoveries, and writs of dower, are usually brought of *mountain*?

In answer to this they have sent us abundance of precedents from King *James* the First to this Time; and add, that it would be of mischievous consequence, if it should be thought that *mountain* was no description, since it would shake all the settlements in the kingdom.

3. Whether ejectments are usually brought of *mountain*, and whether this point has received any judicial determination?

To this they answer: That it happens very often, but has never been judicially determined, because it is so common as never to be questioned.

As to the case in the Exchequer Chamber of *Holborn v. Babington*, we are assured, that judgment was reversed upon another point, whether a challenge was well allowed, and the other objection only mentioned by one of the Judges,

Since therefore the precedents are with the present case, and the thing reasonable in itself, and the sheriff may as easily know how to deliver possession of *mountain*, as of a *carve*, or an *ox-gang*; we are all of opinion, that an ejectment will lie for *mountain* in *Ireland*, and consequently the judgment must be affirmed.

Hilary Term

4 Georgii Regis. In B. R.

Thomas Lord Parker, *Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Pratt, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir William Thompson, *Knt. Recorder of London, Solicitor General.*

Dominus Rex vers. Inhabitantes de Westwood.

IN an order of removal the complaint was recited to be to one justice only, but the ordering part is by two justices; and this was held good. Then exception was taken, that there was no adjudication of the place to which he was removed being his last legal settlement, but only "*We order him to be removed to A. as the place of his last legal settlement.*" And for this fault the order was quashed.

The complaint may be to one justice, the order of removal must be by two. Salk. 478, 488.

Dominus Rex vers. Loggen et Froome.

INdictment against defendants for extortion, setting forth, that the defendant Dr. Loggen being chancellor, and the other defendant register of the bishop of Sarum, did force one Thomas Hollier, executor of the will of Mary Alston, to prove the said will in the said bishop's court, *ubi they bene sciebant* that the said will had be-

A prerogative probate when there are no *bona notabilia* is not void, but only voidable.

fore been proved in the prerogative court of *Canterbury*, and by reason thereof they *extorsive exigebant* of the said *Thomas Hollier* 40 s. On Not guilty pleaded there was a verdict for the king, generally.

The defendants now moved in arrest of judgment, and offered several exceptions, relating either (1.) to the merits, or (2.) to the form of the indictment.

As to the merits two things were insisted on;

1st, That it not appearing there were any *bona notabilia*, the prerogative probate was *ipso facto* void, and consequently the will ought to be proved before the defendant *Loggen*, the testator dying in the diocese of *Sarum*. 2^{dly}, Admitting it not void, but only voidable, yet the prerogative court having proceeded in a matter wherein they had no jurisdiction, that should not hinder the court of *Sarum* from proceeding in a matter within their jurisdiction.

As to the first point; before the counsel had gone far in their argument the C. J. stopped them, and declared, that it was not now to be contested, having been often settled, that such prerogative probate is not void, but only voidable. To which the rest of the court agreed.

2. They held that this voidable probate, being the act of the superior, had so far taken away the power of the inferior, that he could not exercise his jurisdiction, till that voidable probate was avoided.

Then it was urged for Dr. *Loggen*, that in this case he acted as a judge, and therefore was not indictable for an error in his judgment. *Sed per Parker C. J.* In this case he did not act as a judge between party and party, but was only to determine whether he should have such fees or not; and that rule extends only to judges in courts of record, and not to ministerial officers, as was resolved in the case of *Ashby v. White*.

The Exceptions to the indictment were many.

First, For that it only alleged, that the defendants *bene sciebant* that the will had been proved before in the prerogative court; whereas they should have shewn, that it appeared judicially before them. For otherwise this is no more than indicting a judge for giving sentence on one side, when a matter not appearing to him would have inclined him to the other.

To this it was answered, that he could not well know it, unless it appeared under seal; and this being after a verdict the C. J. said he would intend it so, and in fact the second probate was affixed to the same copy as the first.

Secondly, Another exception was, that this was an indictment at Justices of sessions, and the justices have no jurisdiction as to extortion. But peace have jurisdiction of this was likewise over-ruled, for their commission has in it the word extortion *extorsionibus*. 3 Inst. 149.

Thirdly, For that the indictment had not alleged what was the just fee; so *non constat* that the defendants were guilty of extortion. Sed per Parker, it matters not whether 40 s. was the usual fee for probate, since in this case the defendants had no title to any fee at all.

Fourth exception. The defendants offices are distinct; and what Salk. 382, might be extortion in one, might not be so in the other; and therefore the indictment ought not to be joint; as two cannot be jointly indicted for exercising a trade without serving an apprenticeship. Et per Parker C. J. This would be an exception, if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due. And this is an entire charge. For there are no accessories in extortion, but he that is assisting is as guilty as the extortioner; as he that is party to a riot, is answerable for the act of the others. Salk. 334, 595.

Eyre J. doubted whether the *bene sciebat* was sufficient. And quoted a case where *habens notitiam* that he was elected constable, 5 Mod. 129, was held ill. But as to the merits, and all the other objections, the court were unanimous. Sed adjournatur as to this last, and to consider what punishment to inflict on the defendants.

N. B. In the argument of this case this distinction was taken Probate and agreed to on all hands; that a probate by the diocesan in the void, Plowd. 281. case of *bona notabilia* is void, but a prerogative probate when there voidable, 8 Co. 135. a; are no *bona notabilia* is only voidable. Vide Mod. Caf. 146. And Mich. 1 Geo. Cottingham v. Loftis, Parker C. J. took this distinction. 5 Co. 30. a.

Dominus Rex *vers.* Munnery.

Excom' cap'
quashed for
generality.

A Writ *de excommunicato capiendo* was quashed, being only for not appearing to answer *certis articulis animae suae salutem morumque correctionem concernentibus*.

Butler *vers.* Malissy.

Note to pay
jointly or se-
verally how
to be declared
upon.

1 Sid. 189,
238.

CASE upon a promisory note. And the declaration set forth, that the defendant and another did *conjunctim vel divisim* promise to pay. *Demurrer inde*. And for the defendant it was insisted, that the action should have been brought against both. *Et per Parker C. J.* The plaintiff might have brought it against either or both, for he had his election. If the action had been against both, he should have declared as he now does; but that is not right in the action against one only. For he should have declared generally, that this defendant by his note promised to pay, and a several note by two would have been good evidence. As where there are several obligors, and one only is sued, no mention is made in the declaration of the other obligors. Suppose the note had been to pay 50 *l.* or 100 *l.* the plaintiff is intitled to either, but uncertain which till he has made his election; for he that speaks in the disjunctive says true, if either member of the disjunctive be verified; whereas he that speaks in the affirmative, affirms both parts to be true.

The plaintiff prayed leave to discontinue on payment of costs, which was granted; and at another day moved that he might change his rule, to one to amend on payment of costs, but this last motion was denied.

Forster *vers.* Cale.

Whether a
man is an
attorney or
not must be
tried by re-
cord.

IN case *sur assumpsit* the defendant pleads, that he is an attorney of this court, in abatement, and that he ought to be sued as a privileged person. The plaintiff replies, that he is not an attorney, and concludes to the country; to which the defendant demurs. *Et per Whitaker* he ought to have concluded to the record. *Raft. Ent.* 610. b. *Aston* 347. *Thompson* 4. 2 *Mod. Cas.* 106.

Agar contra. Those entries are where the privilege of C. B. was pleaded, which differs from this court; for there is a regular record kept of the attornies, and they must be forejudged, before they can be

be arrested: whereas here the remedy against attornies is speedier than against other persons, for the first proceeding is a bill left in the office, and after a rule to plead the plaintiff may sign his judgment.

The court inquired of the secondary, who informed them, that anciently there were rolls kept of the attornies; but since the stamp act that method has been disused, and a book stamped, and the names entered in that. And *Whitaker* said that on the trial of the affize for the office of chief clerk the rolls from *Edw. 3.* were produced. *Et per Curiam*: The book which is now kept must be taken as minutes in order to make up the record, and it is a warrant to the proper officer for that purpose, and whenever they are wanted they may be made up. Let that be done regularly for the future. In this case the plaintiff should have concluded to the record, for no man can be an attorney but by the act of the court, and that act must appear by the record, for we will not go to a jury to inquire into our own act. When an attorney is struck out, the rule is, *quod extraponatur e rotulo attorn' et clericorum hujus cur'.* *Judic' quod billa cassetur.*

Between the Parishes of Teelby and Willerton.

THE justices remove a certificate woman being *likely* to become chargeable. *Et per Curiam*: By 8 & 9 *W. 3. c. 30.* she is not removable till she *actually* becomes chargeable; and the order was quashed. In another order the justices adjudged, that a person *may* become chargeable. *Et per Curiam*: This is not sufficient, for the statute only enables the justices to remove persons likely to become chargeable, for a man of the greatest estate may possibly one time or other become chargeable, though it is very unlikely; and is such a person removeable? There is as much difference in this case between *may* and *likely*, as between a possibility and a probability.

Certificate-men not removable till actually chargeable. So held Mich. 5 Geo. Parishes of Brocton and Eastwoodhay. So Salk. 530. May become chargeable, ill in an order of removal.

2 Mod. Caf. 51. Salk. 491,

Dominus Rex *vers.* Turner.

THE Defendant being assessed towards the poor's rate for his tithes as vicar, appealed to the sessions, where he is absolutely discharged. *Et per Curiam*: As vicar he is chargeable by 43 *Eliz.* and the sessions has only power to moderate, but not discharge. And the order of sessions was quashed.

Vicar chargeable to poor's rate. Salk. 483, 524.

Vandeput *vers.* Lord.

Grantee of reversion before 4 & 5 Annæ cannot bring covenant without attornment. 2 Lev. 155. *Sed* vide the case of Woodward and Marshall, Mich. 8 W. 3. B. R. (which is shortly put in Salkeld 82.) where it was said, that the grantee might bring covenant, but not debt or distress before attornment. 1 Lev. 259. *Sed* N. B. That was a grantee by fine.

Covenant by the plaintiff as assignee of an executor of an assignee, who by many *mesne* assignments came to the possession of a reversion of a term of years granted in 1624, by the mercers company, reserving rent; and sets forth the lease by them made, that the lessee made an under-lease for a lesser term, wherein the lessee covenanted to leave the premises in repair, and that then the first lessee granted the reversion to A. who granted it over, till it came to the plaintiff, who as assignee of that reversion brings covenant against the defendant as assignee of the second lessee, the under lease being expired, and assigns the breach in not leaving the premises in repair. Judgment by default, *et inquiratur de dampnis*.

Reeve moved in arrest of judgment for that the plaintiff had not shewn a good title to the reversion, there being no attornment set forth on the first grant to A. nor on any of the *mesne* assignments. And he put the question and argued upon it, whether when tenant for years makes an under lease for a lesser term, and afterwards grants the reversion, it passes without attornment; for this case must be considered as at common law, the grant being made long before the late statute. In *Bro. Abr. tit. Attornment, pl. 45.* it is said, that such a reversion will not pass without attornment, because of the attendancy of the rent, which is the present case. If the statute 32 H. 8. c. 34. be objected, I answer, that the statute only gives a compleat assignee the action, and has no operation so as to make good his title. 1 *Inst.* 215. a. A grantee by fine cannot bring covenant without attornment, *a fortiori* a grantee by deed.

Whitaker contra. The case in *Bro.* was before 32 H. 8. so that what was necessary at common law is not so since that statute. I agree, attornment is necessary on a fine, but why? Because the co-nuzee could compel it by a *quid juris clamat*, which the grantee of this reversion cannot. In the case of *Sands v. Brookes, Mich. 5 W. & M. B. R.* it was held that a grantee of a reversion of a copyhold without attornment might maintain covenant against lessee. The 32 H. 8. was made to assist strangers to deeds, and therefore supplies all circumstances.

But further, this is a judgment by default, and aided by the statute for the amendment of the law, which extends all the statutes of jeofailes to judgments by default, in the same manner, as if there had been a verdict; and no body can say but that in this case a verdict would have cured the want of setting out an attornment.

Reeve replied, The case of a grantee of a copyhold doth not come up to this, for copyholders do not claim by deed, but by custom, and therefore no attornment is necessary, as it was before the late statute upon common law conveyances, which is the present case. I agree, a verdict would have cured this defect, because the plaintiff could not have had a verdict unless he had proved an attornment, but as this is a judgment by default, and was not a jeofaile before 4 & 5 *Annae*, c. 16. that statute can have no relation to this case.

2 Mod. Caf.
87.
1 Ven. 109.
Salk. 130.

C. J. The reason why the plaintiff is required to set out an attornment is, because his title is not compleat without it, as a copyholder's is. The 32 *H. 8.* gives none but an assignee this action; it doth not enable him to be assignee, but only as such to bring an action. To which *Powys J.* agreed. *Et per Eyre J.* The 32 *H. 8.* is out of the case; for as the plaintiff is not a compleat assignee, we must take it as it stood at common law, and at common law such a grantee of the reversion as the plaintiff is could not maintain an action of covenant. *Jones Sir W.* 243. *Jones Sir Tho.* 217, 232. *Moor* 527. This was not a jeofaile, so not helped by 4 & 5 *Annae*. And *Prat, J.* said, that the question was no more, than whether the statute 32 *H. 8.* gives the action to him who has not the reversion, for without attornment it passed not. For these reasons the judgment was arrested.

Lane vers. Santeloe.

At Nisi prius in Middlesex, coram King, C. J.

CASE for a malicious prosecution of an indictment of felony, whereof the plaintiff was acquitted, was brought against the prosecutor and the justice who committed; and the jury gave 200 *l.* damages against the prosecutor, and 20 *l.* against the justice, and the C. J. directed the verdict to be taken accordingly.

Different damages given.

Westbrooke vers. Strutville.

Coram King, C. J. in Middlesex.

ON Not guilty in trespass for an assault, the defendant gave in evidence his marriage with the plaintiff, to encounter which she proved a former marriage to one *Westbrook*, who was alive at the time of her second marriage. *Pro defendente* it was insisted, the plaintiff ought not to give felony in evidence to support her action; but this was over-ruled, and she obtained a verdict, her marriage with the defendant being void *ab initio*.

Wife *de facto*
only may
bring trespass
for assault by
husband.

Strutville

Strutville *vers.* —

Coram Parker C. J. in Middlesex.

Wife *de facto*
a servant.

WHERE a woman marries a second husband living the first, and the second not privy; as to what she acquired during the cohabitation, the C. J. said he would esteem her as a servant to the second husband, who is intitled to the benefit of her labour.

Williams *vers.* Lady Bridget Osborne.

Before the Delegates at Serjeants Inn, January 22, 1717.

Of the sup-
pletory oath.

THE question below was, whether Mr. *Williams* was married to the lady *Bridget Osborne*; the minister who performed the ceremony having formerly confessed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both sides, the Judge upon the hearing the cause required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposes in his libel and articles. The accepting this oath (as was agreed on both sides) lies *in arbitrio judicis*, and is only used where there is but what the civilians esteem a *sempilena probatio*; for if there be *plena probatio*, it is never required; and if the evidence does not amount to a *sempilena probatio*, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a *sempilena probatio*, the confirmation of it by the party's own oath will not alter the case.

Upon admitting the party to his suppletory oath, the Lady *Bridget Osborne* appeals to the Delegates. So that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the Judge in this case ought to have admitted Mr. *Williams* to his suppletory oath, as a person that had made a *sempilena probatio* of that which he was then to confirm.

The questions before the Delegates were two: 1. Whether the suppletory oath ought to be administered in any case, to enforce a *sempilena probatio*? 2. Admitting it might, whether the evidence in this case amounted to a *sempilena probatio*, so as to intitle Mr. *Williams* to pray that his suppletory oath might be received?

1. As

1. As to the first, it was argued to be against all the rules of the common law, that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts no man can be examined that has any interest, though he be no party to the suit, for *minima exceptio tollit sacramentum juratoris*. On the other side many authorities and precedents were cited out of the civil law, to prove this practice of allowing the suppletory oath. And therefore the court held, that by the canon and civil law the party agent, making a *sempilena probatio*, was intitled to pray that his suppletory oath might be received. And though it be against the rules of the common law, yet this being a cause of ecclesiastical conuzance, the civil and not the common law is to be the measure of their proceedings, and therefore this practice being agreeable to the civil law, is well warranted in all cases where the civil law is the rule; and the exercise of it lies *in arbitrio judicis*.

2. It being therefore established, that a person making *sempilena probatio* is intitled to his oath; the next question was, what is, according to the notion of the civilians and canonists, a *sempilena probatio*. With them it was argued on behalf of the lady, that nothing is esteemed as a *plena probatio*, unless there be two positive unexceptionable witnesses to the very matter of fact, as to the marriage. That a *sempilena probatio*, which is the next degree of evidence, is what is affirmed by the oath of one witness as to the principal fact, and confirmed by concurrent circumstances.

And 1st, It must be *per unum testem*. 2^{dly}, Evidence that concludes necessarily, and not by presumption. 3^{dly}, That has no presumption to encounter it; and 4^{thly}, The witness must be *honestus persona*.

That matrimonial causes require the greatest certainty; and where that is the sole question, the proof ought to be fuller, than where it comes in by incident, as on granting administration.

To this it was answered on the other side, that *sempilena probatio* implies no more than what the common lawyers call presumptive evidence; and that is properly called presumptive evidence, which has no one positive witness to support it, but relies only on the strength of circumstances. And when there is one witness, who deposes directly to the principal fact, this immediately ceases to bear the name of presumptive, and assumes that of positive evidence. And that which in the temporal courts passes for positive

evidence, is the same degree of evidence with the *plena probatio* of the canonists and civilians. The suppletory oath does *ex vi termini* import, that there has been no one positive witness to the principal fact; and he that demands to be admitted to take his oath, does thereby admit that he has produced no conclusive evidence to the point in issue, and therefore *pars ipsa fungitur officio testis*.

There is no fixing the bounds of a *sempilena probatio*; for in many cases circumstances may overbear positive evidence, and then if those circumstances should not be esteemed to amount to a *sempilena probatio*, when the positive evidence would exceed it; that would be to overthrow the positive evidence, by that which is not so strong.

Sempilena probatio therefore they concluded to be, that degree of evidence which would incline a reasonable man to either side of the question; and implies in the notion of it, that a positive witness has not deposed to the principal fact. And in this case though there was no positive conclusive evidence, but only such as depended on circumstances, as confessions, and letters, and unusual familiarities; yet the court thought it amounted to a *sempilena probatio*, and consequently that the dean of the Arches had done right, in admitting Mr. Williams to his suppletory oath; and therefore they dismissed the appeal with 150 l. costs. N. B. Before this appeal upon the point of the *gravamen*, the Judge below had given sentence *in principali* in favour of the marriage, and the appealing upon this collateral point was only to protract the time. To obviate this the court of Delegates, instead of remitting the cause to the Arches, retained it *ad instantiam partis*, and 11 December 1718. heard it upon the merits, and confirmed the former sentence.

Sir Harry Haughton *vers.* Starkey. In Scacc'.

What costs are to be given in prohibition.

AFTER judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed, the statute of 8 & 9 W. 3. c. 11. giving costs *in suits upon prohibitions*; and whether they should be computed from the first motion, or only from the declaration, was the doubt. Upon search it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances. *Eads v. Jackson*, B. R. 2 Geo. and *Brown v. Turner et al'* in C. B. where they were allowed from the first motion. And of this opinion were all the Judges, as Baron Fortescue informed me. And all the officers were directed for the future to allow the costs of the first motion. And afterwards, Hil. 12 Geo. B. R. *inter Swetnam et Archer*, it was stated in the same manner,

manner, and agreed to be the uniform practice ever since; and *Pas. 1 Geo. 2.* between *Sir Thomas Bury* and *Crofs*, the same doubt was raised by a new master, and the court ordered costs from the first motion.

Dominus Rex vers. Inhabitantes de Haughton.

UPON a special order the case was stated, That about five years since one *John Evans* was hired into the parish of *Haughton* from *Ash Wednesday* to *Christmas*; that at *Christmas* he went home to his father, who lived in another parish, took his clothes with him, and staid a week. That then he returned to *Haughton*, and hired himself to, and served the same master eleven months. Then he went home again to his father for a week, and returned, and was hired and served the same master other eleven months. That then by agreement between the master and him, and to avoid a settlement in *Haughton*, he went home to his father for a week, and afterwards served the same master for five weeks. And there being so many hirings and services, the justices adjudge the settlement in *Haughton*.

Several hirings and services for 11 months give no settlement.

Denton, Reeve and *Foley* moved to quash this order, there being no actual hiring and service for a year, both which the statute of 3 & 4 *W. & M. c. 11.* requires. *Mich. 9 Ann. Paroch. Rudswicke v. Dunfole, Salk. 535.* there was a hiring for a quarter of a year, and afterwards for half, and then for another half year, and a service for all; but this was held to be no settlement. *Hil. 10 W. 3. Paroch. Overton v. Steventon*, there was a hiring and service for half a year, then a hiring for a whole year, and a service for half; and this was held to be a hiring and service for a year, and the settlement in that parish. So *Pas. 1 Geo. B. R. Rex v. Inhabitantes de Brightwell in Berks*, there was a hiring and service from three weeks after *Michaelmas 1712.* to *Michaelmas 1713.* then a hiring to the same master for a year, and a service for eleven months, and these two hirings and services were held to gain the servant a settlement. *Pas. 1 Geo. Paroch. Pepper Harrow v. Frencham*, a hiring and service from 3 *October* to *Michaelmas*, and the servant at the master's request staid so long after as brought the year about; but this was held no settlement. *Mich. 12 Ann. Paroch. Horsham v. Shipley*, there was a hiring from 19 *February* to *May-tide*, from thence to *Lady-day*, then to *May-tide* again, then to *Lady-day*, and then to the next *May-tide*; but there being no contract for a year, the court held it no settlement.

Hawkins contra. A servant whilst such is not removable by any act, when a man is hired for a year in one parish, and serves the last quarter with his master, who removes into another parish, yet the servant gains a settlement, as has been adjudged, notwithstanding the act says, *a hiring and service for a year in any parish.* Mich. 1 Geo. Paroch. St. George v. St. Catherine, where the master removed at half a year's end. The statute says, *apprentices bound out by indenture*; and yet it has been extended to those bound out by deed poll. So the statute of Gloucester as to waste has been extended beyond the letter, rather than it should be evaded. In the present case it plainly appears, that this was a contrivance from the beginning, to exempt this parish, by sending him away at eleven months end.

Foley. He needed not to go away, to avoid that which he could not have gained by staying.

C. J. This is plainly a design to save this parish, and I suppose all the parishioners have agreed never to hire any servant for a year. The ground of the statute relating to servants was, that a person who had strength of body enough to hire himself out for a year, would when that year is expired be able to support himself; and the same reason holds in the case of apprentices. I am afraid we cannot interpose in this case, but it is proper the legislature should.

Pratt J. We must take the law as it stands, and follow former resolutions; for the sessions have ever since for the most part acted pursuant to those resolutions; and if we should do otherwise, it will introduce the utmost uncertainty and confusion; and little respect will be paid to our judgments if we overthrow that one day, which we resolved the day before. The statute expressly requires a hiring and service for a year; and it is admitted that if there was but one hiring and service for eleven months, that would give no settlement; and why any subsequent hirings of the same nature should gain him one, I cannot imagine. The reason of hiring servants at first for eleven months only is, because the servant may prove idle and good for nothing, and the master, as a prudent man ought to do, avoids bringing a charge upon the parish, till he has had experience of the diligence and fidelity of his servant: And when he has had eleven months experience of his diligence and fidelity, then if he hires him a second time, that is grounded upon his good service during the former hiring, but still the second hiring must be as full, as if the first hiring were out of the case. And if the first hiring were out of the case, then the second would stand in the same

same parity of reason with what I mentioned before, a single hiring and service for eleven months, which it is agreed will give no settlement.

If there was any fraud, the justices should have examined into it. We cannot judge of the fact, but the law upon the fact. 1 *Ven.* 310. Demand and refusal is evidence of a conversion to a jury, but not to the court. 1 *Roll. Abr.* 523. 10 *Co.* 56. *Hob.* 187. 1 *Ven.* 401. 1 *Sid.* 127. *Hutt.* 10. *Salk.* 531. If that case of the parishes of *Overton* and *Steventon* was open again, I should not readily go into that opinion.

The court took time to consider of it, and at the end of the term they held, that as the law now stands, the several hirings and services that were stated could give no settlement. They said it would be dangerous to depart from the words of the statute, and if they once did, they should never know where to stop. Wherefore the order was quashed.

Easter Term

4 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Nicholas Lechmere, Esquire, Attorney General.

Sir William Thompson, Knt. Solicitor General.

Memorandum: This term the Lord Chief Justice *Parker* was made Lord Chancellor, and Mr. Justice *Pratt* succeeded him as Chief Justice, and Mr. Baron *Fortescue* came down into the King's Bench, and was succeeded by Sir *Francis Page* the King's Serjeant, and Sir *Edward Northey*, Knt. was removed from being Attorney General, and *Nicholas Lechmere*, Esquire, was made Attorney in his room.

Anonymous.

Sunday a day in rules, unless the first or last.
Salk. 624.

THE writ was returnable 30th *January*, and the bail-bond assigned the 4th of *February*, between which and 30th *January* a *Sunday* happened. *Et per Curiam:* It is well assigned, for *Sunday* is to be reckoned as one of the four days (there being no more allowed in actions laid in *London* or *Middlesex*.) And so it is in rules to plead, except the first or last day happen upon a *Sunday*; with

with this difference, that if the rule be given upon a *Sunday* it goes for nothing, but if it expires upon a *Sunday*, the defendant has all the next day to plead in.

Lanquit *vers.* Jones.

THE Sheriff returned to a *feri facias*, that the defendant is *clericus beneficiatus nullum habens laicum feodum* within his bailiwick; whereupon a *feri facias de bonis ecclesiasticis* issued, directed to the late bishop of *Sarum* in one cause, and in another between the same parties directed to the present bishop. And upon affidavit that the debts were levied thereupon, the court made a rule upon the executors of the first bishop, to return the first writ, and upon the now bishop to return the second.

Rule on executor to return *feri facias de bonis ecclesiasticis*.

Drake *vers.* Taylor.

THE vicar libels for tithes of turnips, and lays his title to them by prescription and endowment. The defendant pleads, that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips. And last term he moved for a prohibition *pro defectu triationis*, and obtained a rule *nisi*. And now *Reynolds* Serjeant came to shew cause against a prohibition, for that turnips are a late improvement in *Norfolk* (where the matter arises) and quoted 2 *Roll. Abr.* 310. *Z.* 5. 1. 2. And where the matter is originally of ecclesiastical conuzance unmixt with any temporal ingredient, no prohibition lies. The vicar is *prima facie* intitled to nothing, unless he shews a right either by prescription or endowment. These endowments are of an ecclesiastical nature, and so is the extent of them. For anciently and until the Statutes of 15 *R.* 2. *c.* 6. and 4 *H.* 4. *c.* 12. the ordinary endowed the vicarage at his discretion. In 2 *Brownl.* 36. it is said and agreed, that if there be a parsonage impropriate, and a vicarage endowed, and there be any difference between them, it shall be tried and determined by the ordinary. In *Scaccario et in C. B.* this prohibition has been denied.

Where the question is whether the rector or vicar be intitled to tithes, no prohibition lies.

Yorke contra. That rule which has been laid down, will not be insisted upon now-a-days, for the clergy will not pretend to be exempted from the temporal jurisdiction merely because they are ecclesiasticks. But in this case both parties are not ecclesiasticks, for the libel is against the parishioner, and it lays a custom which is denied and must be tried, and that has always been good ground for a prohibition. We do not pray it for defect of jurisdiction, but want of trial of the prescription, which is what the vicar grounds himself upon

upon in making his title to the tithes; and the question is not upon the endowment, though I admit the prescription supposes an endowment.

C. J. Though both parties are not ecclesiasticks, yet the thing in controversy belongs either to one ecclesiastick or another, for either the rector is intitled to the tithes or the vicar, and what matter is it to the parishioner who has them? for he can only pay them to one. This is properly a dispute what belongs to the vicar upon the endowment, and that evidence which will intitle him to a sentence below, will not enable him to recover here, and therefore I am against a prohibition. To which *Powys* and *Eyre* Justices agreed. *Et per Pratt J.* If we should grant a prohibition in order to try the custom, and it should be found against the custom, yet that will not determine the question upon the endowment; and therefore we ought not to draw them out of that court, which may properly determine the whole matter. And besides in the spiritual court fifty years makes a prescription, though it will not here. The rule for a prohibition was discharged.

Wallis *vers.* Scott.

Where a special request is necessary to be alleged, and where not.

THE plaintiff declares, that the defendant, in consideration the plaintiff would make him a set of sails worth 45 *l.* promised to pay so much for them upon request; and avers, that he made the *said sails*; and the defendant although often requested refuses to pay. *Demurrer inde.* And *Branthwayte* Serjeant *pro defendente* argued, that this being a special contract, the plaintiff must shew a performance of all on his part, which he has not done; for he has not averred that he made the sails worth 45 *l.* and if they were not worth it, the defendant is not chargeable.

¹ Lev. 48.

² Lev. 198.

Lutw. 231.

Poph. 160.

Hutt. 2, 42,

73.

Lat. 93.

Ley. 69.

Lat. 208, 209.

¹ Sid. 303.

Secondly, The action being founded upon the breach of contract, there ought to be a special request laid. For this differs from the cases where there is a precedent debt or duty whereon to ground the promise, for there I admit the action is a request. *2 Cro.* 183. The defendant, in consideration the plaintiff being an innkeeper would entertain the defendant's commissioners, promised to pay for their lodging and diet upon request; and there being nothing but the general *licet saepius requisit*, judgment was arrested upon that distinction, between a collateral contract for a thing *in fieri*, and a precedent debt or duty. And to the same purpose is *2 Cro.* 523. In *2 Saund.* 32. *Assumpsit* on mutual promises to perform an award, or pay each other 40 *l.* upon request, and in an action for the 40 *l.* the declaration was held ill, because no request was alleged, and the former

former cases and differences were agreed. Here is no money to be paid till two things are done, neither of which appear, 1. the making the fails of such a value, and 2. a request to pay for them.

Yorke contra. In actions upon the case the plaintiff may lay it as he can prove it, and is not obliged to a general *indebitatus assumpsit*. The value is part of the description of the fails, and therefore when we aver we made the aforesaid fails, *velaturas praediectas*, that takes in the whole description. As to the request, the *licet saepius requisit* is sufficient. But if not, yet the want of a special request ought to have been shewn for cause of demurrer. The cases in *Croke* can never be law, for they are after a verdict, when the court will intend a request proved, and so is *Pop.* 160.

Brantbwayte replied. It is admitted that the value ought to be averred, and the only question now is, whether it be or not. *Praediect* will not be a sufficient averment. In *Yelv.* 36. Trespass for taking goods *a personâ* of the plaintiff, and judgment arrested for the insufficiency of averring the property. These cases as to the request, being after a verdict, the argument holds *a fortiori* in this case, which is on a demurrer. The general request as alleged may be since the action brought, and this at most is but an executory promise.

Powys J. (*absentibus Parker et Pratt*) thought the *praediectas velaturas* was sufficient. *Et per Eyre J.* I do not think the value needed be alleged; but if it need, yet the *praediect* takes it in, for if the value be part of the description, then it is averred that the plaintiff made such a set of fails as was agreed upon (that is) a set of fails which answers every part of the description.

Where notice or a request are by law necessary, there the general averment will not be sufficient; but it must be particularly set forth, that the court may judge whether the notice or request were sufficient. But in this case I take it no request was necessary, for on the making the fails the money immediately becomes due. If I promise a taylor, that in consideration he will make me a suit of cloaths, I will pay him so much; there needs no request, for as soon as he has done his part, there is a duty vested in him. And this differs from the cases where the payment is to be to a third person, or where an award directs a request.

Afterwards, the court being full, *Brantbwayte* mentioned *Cro. Eliz.* 773. 91. *Hutt.* 107. And *Yorke* quoted *Yel.* 66, 121. 3 *Bulf.* 258. 2 *Cro.* 639. And the former cases of 2 *Cro.* 183, 523. were denied *per Eyre J.* and judgment given for the plaintiff.

Dominus Rex *vers.* Inhabitantes de Ivinghoe in Com'
Bucks.

Where there
is an hiring
for a year,
and a service
for part to
a stranger, yet
if there be no
dissolution of
the first con-
tract it is a
settlement.

ON a special order of sessions the case appeared to be, That one *Nicholas Young*, being legally settled in the parish of *Cholesbury*, was at *Michaelmas* 1715, hired into the parish of *Ivinghoe*, by *John Knight*, to serve him as a shepherd till *Michaelmas* following. That he entered upon the service, and continued with *Knight* till *Lady-day*, who then paid him half a year's wages, and left the farm to one *Smith*, who entered and took all the stock and servants, and in harvest time took *Young* off from keeping sheep, and set him to harvest work, for which he paid him 5 s. extraordinary, and at the year's end paid him the other half year's wages. That *Knight* when he left the farm never told *Young* he was no more his servant, nor were there any transactions between them two towards dissolving the contract; neither did *Young* ever make any new contract with *Smith* for the last half year. And the justices adjudge the settlement in *Ivinghoe*, where the hiring and service were.

Ld. Raym.
1512.

Denton moved to quash the order. Because to make a settlement there must be both a continuance of the contract, and service; both which were broke off at the half year's end. *Mich. 9 Annae, Paroch' Rudswick et Dunsfole, Salk. 538.* There was a hiring and service for a quarter of a year, then for half a year, and afterwards for another half year, all which were held to give no settlement.

Yorke. By 8 & 9 W. 3. c. 30. it is required, that the party continue in the same service for a year. There must be an identity of the service, it must appear to be the same master, which this is not, and here is an alteration of the wages. The court will not consider what is most for the benefit of the servant, but which is the proper parish to be charged; it is all one to the servant, where he is settled.

Reeve contra. It being expressly stated, that there was no new contract, the first must be taken to have continuance all the year. And if *Smith* had not paid *Young* the last half year's wages, no doubt but as this case stands he might have come upon *Knight* for them. The 5 s. shew he was *Knight's* servant all along, for otherwise *Smith* had no occasion to give him that extraordinary pay. The statute does not require an identity of the contract, for *Hil. 10 W. 3. Paroch' Overton et Steventon*, a hiring and service for half a year, and then a hiring for a whole year, and a service for

for half, was held to gain a settlement. So *Pasch. 1 Geo. B. R. Rex v. Inhabitantes de Brightwell in Com. Berks*, there was a hiring and service from three weeks after *Michaelmas 1712* to *Michaelmas 1713*, then a hiring to the same master for a year, and a service for eleven months; and this was held a good settlement. The statute 3 & 4 *W. & M. c. 11.* says, that a binding and inhabitation shall gain a settlement, so that by the words a binding is required; and yet *Trinity 13 W. 3. B. R. Rex v. Inhabitantes de Eccles in Com. Norf.*, it was held, that if the master to whom the binding was, assigns his apprentice over to another, a bare inhabitation forty days with the assignee gives a settlement. In this case there is a hiring and service for a year in the parish of *Ivinghoe*, and that is sufficient.

Lee. By 13 & 14 *Car. 2. c. 12.* forty days inhabitation gave a settlement. But it being found, that diseased and disorderly persons often came into parishes and staid out the time, it was thought proper by the statutes of 3 & 4 & 8 & 9 *W. 3.* to require a hiring and service for a year. And this was thought a good remedy, because it was supposed no body would incur themselves with a sickly or disorderly person for a whole year, who perhaps would have dispensed with them for forty days. And it is not presumed, that a person having ability of body enough to serve a year, will become chargeable; and he is looked on as bringing so much substance into the parish. I agree the word *same* in the latter statute is a word of relation, but it will be satisfied by referring it to *the same place*. Those statutes have always had a liberal construction, as before 3 & 4 *W. & M. c. 11.* that bearing offices in a parish amounts to notice. *Show. 12.* So the statute says, *any unmarried person having no child*, and yet a person having a child which was grown up, and no incumbrance to him, was held to be within the statute. So *Pasch. 10 Annae, Regina v. Paroch' de Aldenham*, and *Mich. 1 Geo. St. Saviour's Southwark*, marrying within the year was held no hindrance of the settlement. *Salk. 527, 529.*

Yorke. That case is within the very words, for the statute speaks only of persons unmarried at the time of the hiring.

C. J. The statute requires two things; a hiring, and a continuance in the same service for a year. There can be no doubt but that in this case there is a compleat and perfect hiring for a year; but the question turns upon the service. Half of it was actually a service to *Knight*, and the rest in fact was a service to *Smith*; but there being no new contract with *Smith*, nor any dissolution of the first contract with *Knight*; it seems considerable, whether the whole shall

shall not be taken to be a service to *Knight*. As if I lend my servant to a neighbour for a week, or any longer time; and he goes accordingly, and does such work as my neighbour sets him about: Yet all this while he is in my service, and may reasonably be said to be doing my business.

If the first contract be not discharged, it must have a continuance, and under it the servant is intitled to demand his wages of the first master. And the 5 s. given him by *Smith* is no argument to the contrary, no more than if in the case I put before, my neighbour had given my servant a gratuity for his extraordinary trouble. What agreement there was between *Knight* and *Smith*, *non constat*, but here is no act done by the servant that shews his consent to change his master. And therefore I take this to be a service for the whole year pursuant to the first contract, and consequently the settlement is at *Ivinghoe*, where the service was.

Ante 83.

Powys J. The private reason that we went upon in *The King v. the Inhabitants of Haughton*, where it was held that several hirings and services for eleven months gained no settlement was, because if we should once get out of the statute, there would be no end, and by the same reason that we abated one day we might abate two, *et sic in infinitum*. I think in this case the settlement is in *Ivinghoe*.

Salk. 479.

Eyre J. And so do I. This is a contract for a year between *Knight* and *Young*, and not to be dissolved during the year without both their consents. There is actually no consent on one side, and but an implied consent on the other. It weighs nothing with me, that *Smith* paid the last half year's wages, for I look upon him only as a person to whom the servant was lent, and there is no doubt but that *Young* might have demanded the wages of *Knight*. The paying the 5 s. is so far from being an argument that the contract was dissolved, that it is to me a strong evidence of its continuance; for when *Smith* goes to set him about harvest work, no says he, I was hired to be a shepherd, and had small wages accordingly; and thereupon the other agrees to give him 5 s. an equivalent for the hardness of the work.

Fortescue J. The difficulty arises upon the word *same*, which may extend to master, parish, and business. And taking it in those senses, this case comes within the words of the statute; and there can be no doubt but that it comes within the reason of it, for he is no more likely to be chargeable now, than if he had actually served *Knight* all the year. Upon the reasons which have been given, I think, here is the same master, the same sort of service, in the same parish, and a continuance of the contract throughout the whole. The order was confirmed.

Dominus

Dominus Rex *vers.* Motherfell.

UPON a motion for a new trial, the judge certified the special matter in writing, and the court refused to hear any affidavits of what passed at the trial, looking upon the certificate of the judge, who was an indifferent person, to be of a much higher nature than the oath of the party interested, and therefore ordered the counsel to take the fact as it was stated by the certificate, and not argue about the fact, but the law upon the fact. And the question being, whether a particular matter offered in evidence was well over-ruled by the judge, the court said, that if he had rejected that which was good evidence, it would be ground for a new trial; but if the matter offered was not legal evidence, then the first verdict ought to stand. And as to that the fact was, that on an information in nature of a *quo warranto* the prosecutor produced in evidence a book, which appeared to be only minutes of some corporate acts ten years ago, all written by the prosecutor's clerk, who was no officer of the corporation. And this being opposed by the other side, as having never been kept amongst, or esteemed as one of the corporation books, in which the entries were always made by the town clerk, and there being some suspicion that this book was not genuine, the Judge, before he admitted it to be read, required an account where it had been kept for these ten years, and whether any body had seen it before, which the prosecutor not being able to give him any satisfaction in, he rejected it. *Et per Curiam*, Corporation books are generally allowed to be given in evidence, when they have been publicly kept as such, and the entries made by the proper officer; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend, but then that must be made appear. Whoever produces a book, must establish it, before he delivers it in. We often make people, when they produce deeds, give an account where they have been kept, and how they came by them. Therefore we are of opinion, this evidence thus offered was well over-ruled, and consequently there must be no new trial.

What corporation books may be given in evidence.

Hunt's case.

THE court granted a *mandamus* on 1 Geo. against mutiny and desertion, directed to the justices of peace, for them to compel the treasurer of the county to reimburse a constable the extraordinary charges he had been at in providing carriages on the expedition into Scotland.

Mandamus.

Between the Parishes of Horncastle and Boston.

What is a
good certifi-
cate within 8
& 9 W. 3.
c. 30.

A. Being legally settled in *Boston*, came into *Horncastle* as a certificate man; and the justices, thinking the certificate not sufficient, made an order to remove him back to *Boston*. And now upon motion to quash the order, it appeared that the certificate was signed by the churchwardens or overseers, as 8 & 9 W. 3. c. 30. directs; and that it was attested by two as witnesses, who were justices of the peace. The statute requires it to be attested by two witnesses, and allowed by two justices of the peace. And *Chestyre* insisted, that this was a better certificate than such a one as is mentioned in the statute, for the attestation of the signing it is only to satisfy the justices, that it is the hand of the parish officers; and nothing can be so satisfactory to them, as what they see. And it is not requisite, that there be four distinct persons, two to attest, and two to allow; but the justices that allow the certificate may act in both capacities. To which the court agreed, when it appeared they took upon them to act both as witnesses and justices; but here it only appeared they subscribed as witnesses, for there are no words of allowance. If this should be held good, the justices may be drawn in to sign as witnesses, when perhaps they do not so much as know what the instrument is, and never imagined what they did would pass for an allowance. The certificate was held void, and the order confirmed.

Frost *vers.* Wolveston. In C. B.

Infant declares the uses of a fine to be suffered at full age, then he may declare other uses.

AN infant covenants to levy a fine by such a time to such uses. Before the time he comes of age, then the fine is levied, and by another deed made at full age, he declares it to be to other uses. The court held the last deed should be that which should lead the uses.

Loyd *vers.* Lee.

At nisi prius in London, coram Pratt C. J. de B. R.

Forbearance no consideration where no cause of action before.

A Married woman gives a promissory note as a *feme sole*; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her it was insisted, that though she being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise

promise when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called. *Vide* 1 *Ven.* 120, 159. *Salk.* 29. *Yel.* 50, 184. 2 *Saund.* 261. *Hob.* 18, 216. *Pop.* 152, 177. *Lat.* 21, 141.

Anonymous.

At nisi prius in Middlesex, coram Pratt C. J.

THE question in ejectment being parcel or not parcel, a survey Survey, where evidence. was offered in evidence on the plaintiff's side, which was taken by one under whom the lessor claimed, wherein the lands in question were included. But this being an act to which the defendants were not privy, and consequently not bound, and it being dangerous, and tending to encourage people to take more than their own into a survey, the Chief Justice rejected it.

Stafford vers. the City of London. In Canc'.

THE plaintiff being a co-lessee with *A.* brought his bill to have the rent apportioned on a partial eviction. And because the other lessee was neither plaintiff nor defendant, (for if he refused to be a plaintiff he might be made a defendant) the bill was dismissed with costs. And instances were cited where bills have been dismissed for want of parties, as well as where causes have been put off only. One lessee alone cannot come into Canc' for an apportionment. S. C. 1 Will. Rep. 428.

Trinity

Trinity Term

4 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Nicholas Lechmere, Esquire, Attorney General.

Sir William Thompson, Knt. Solicitor General.

Dominus Rex vers. Inhabitantes de Almanbury in com' Ebor'.

*Order upon
appeal without
saying of the
party grieved,
good.*

AN order of two justices is quashed at sessions upon appeal, without saying, *at the appeal of the party grieved*. And this was objected, in order to quash the order of sessions, and compared to the case of a complaint that a man is likely to become chargeable, which has been held ill, because the complaint must be by the churchwardens and overseers. And the case of *Rex v. Sir Thomas Putt*. Inquisition at sessions *coram A. et al' sociis suis*, was held ill, for there must be two, and nothing is presumed in a limited jurisdiction. And the court here inclined to quash the order for this fault, till they were informed the precedents were most of them so, and for that reason and that only, as the C. J. declared, the order was confirmed. *Yelv. 126.*

Waring

Waring *vers.* Dewberry.

THE landlord having arrears of rent due to him dies intestate. On 8 *Annae* the plaintiff in this action sues out execution on a recovery against the defendant who was the tenant, and levies the money by sale of the goods. Then administration of the intestate's goods is committed to *A.* who thereby became intitled to the arrears, and now moved for a rule to have one year's rent out of the levy money pursuant to the statute of 8 *Annae*, c. 17. And *Robins* urged, that though he was not administrator at the time of serving the execution, yet as soon as the administration is committed, it relates to the death of the intestate, so that he may bring trespass or trover for goods taken between the death of the intestate and the commission of administration. 3 *Lev.* 35. 3 *Mod.* 276. *Salk.* 295. *Sed tota curia praeter Powys J. contra*; for relations which are but fictions in law shall not divest any right vested in a stranger *mesne* between the intestate's death and the administration. The statute it is true was made for the benefit of landlords, and to prevent the tenant's setting up a sham execution to defeat him of the rent. He has still the same remedy that he had before, and if he will have the additional remedy, he must make himself capable of it, which the administrator here could not. He could not demand the rent; it not being certain he would be administrator, for the ordinary might refuse, and the sheriff is not obliged to wait and see if any body comes and demands the rent. He cannot take notice what arrears there are, but if the landlord comes and acquaints him with it, then and not till then is he obliged to see the year's rent satisfied before removal of the goods. If it should be otherwise, it would be in the power of him that is intitled to administration to defeat the plaintiff of his execution. For suppose he never takes administration, must the execution stand still? If the landlord himself had not demanded before removal, he had been too late. Here was no landlord at all, so that there could be no demand, and it is now too late to ask it.

On 8 *Annae* the landlord must demand; or the sheriff is not bound to secure the rent.

As to what acts administration shall relate to the death of the intestate.

Between the Parishes of Mursley and Grandborough, in Com' Bucks.

BY an order of two justices *John Chappell* was removed from *Mursley* to *Grandborough*. Upon appeal to the quarter-sessions they state the case specially for the opinion of the court.

A man cannot be removed from his term.

That *John Chappell* before his marriage with *Susanna* his wife was settled in the parish of *Grandborough*. That Sir *John Fetherstone* by indenture dated 24 September 1667, did demise and grant to *Robert Eddin*, his executors, &c. one cottage with the appurtenances of the yearly value of 30 s. in *Mursley* for ninety-nine years at 1 s. rent. That 3d August 1689 *Eddin* assigned to *Goddin* in trust for *Mary* his wife for life, and then to *William Eddin* his son for the residue of the term. That *Robert*, *Mary* and *William* died, and *Susanna* the wife of *William*, as administratrix became intitled to the term, and May 11, 1709, in consideration of 15 s. demised to *Nicholas Eymes* the same cottage (except one bay of building being the south part thereof with a leastowe for an habitation for herself) for twenty-four years at a pepper-corn rent. That she lived in that part of the premises so reserved, and married the said *John Chappell*; and whether he is settled thereby in *Mursley*, was the question; and the sessions adjudge it no settlement, and confirmed the order of the two justices for his removal to *Grandborough*.

Denton now moved to quash both the orders, *John Chappell* being legally settled in *Mursley*. For where a man has an estate in any parish, he gains a settlement if he lives there. It has been often adjudged as to a freehold. *Mich. 10 W. 3. Rystwick et Harrow, Salk. 524.* And *Pasch. 11 Annae, Harrow et Edgware*, it was resolved in the case of a copyhold of a man's own for life, though but 25 s. yearly value.

Darnall Serjeant. He must be settled in that parish where the estate of his wife lay and on which he inhabited. For he coming by marriage to that estate, does not come to inhabit under the circumstances mentioned in the act, *liable to become chargeable*, and so not subject to be removed. In that case of *Rystwick and Harrow, Holt C. J.* said, the terms *not removeable* and *settled*, are one and the same thing; because such a person is not within the authority of the justices. He that comes to an estate by descent, purchase, or marriage, is not a person that takes a tenement within the intent of the act.

Reeve contra. The wife has but the trust of a small part of a cottage, for the legal interest of the estate is in *Goddin*. This is but an estate for years, and that has never yet been adjudged sufficient to give a settlement. A freehold has, and so has a copyhold, for that is by custom become a durable estate. And the same argument may be used, if this holds, where he takes a lease for years not of 10 l. value at a rack rent.

Lee. The wife takes the term as administratrix, so he is only intitled in *auter droit*; and as it is under 10 *l. per annum* yearly value, he is likely to be become chargeable, and so may be removed.

Curia. This is not a case within the intent of the act, which was to prevent persons running up and down from one parish to another, till they become vagabonds. But a man who comes to settle upon his own, is not to be considered in that view; and be it for life or years, the law is the same. This is not a taking a tenement under 10 *l. per annum*, for the 1 *s.* is not reserved as a rent, but only an acknowledgment usually paid on long leases. The case of a copyhold is stronger than this, for that is but an estate at will. The way to make him chargeable, is to strip him of his own, for he may not be able to let it. The orders were quashed.

Dominus Rex vers. Inhabitantes de Hales Owen.

THE sessions, reciting that *Joseph Higgen* was bound out by indenture as the statute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of surgeons incurable: therefore the sessions discharge the master from his apprenticeship, and four justices sign the order.

Sessions cannot discharge apprentice on account of sickness.

Darnall Serjeant moved to confirm the order, because the master cannot now have the end of the binding, which was the service of his apprentice.

Willes contra. The statute only empowers the justices to discharge for misbehaviour, and not for sickness. Besides, allowing they had a power to discharge, yet here they have not executed it as the statute requires; for it is not inrolled; neither is it mentioned to be by a justice of the *quorum*. There must be four justices, one of the *quorum*.

Both exceptions to the form were held good. But the court quashed the order as to the substance, for the master takes him for better and worse, and is to provide for him in sickness and in health.

Hinchcliffe vers. Payne.

PAYNE the father, being in contempt in Chancery for non-payment of money, an order is made upon him. *Payne* the son resists the service, for which contempt he is committed to the Fleet,

Escape warrant where grantable.

Fleet, and turns himself over to the *King's Bench*, and goes at large till he is taken up by an escape warrant, and committed to *Newgate*. Now he moved for a *Superfedeas* to that escape warrant, the contempt not being such an one as is within 1 *Annae*, c. 6. which speaks only of contempts *for not performing an order*, which *Payne* the son was not obliged to do. *Et per Curiam*: The father would have been within the act, but the son is not. This statute is not to be extended by equity, because it is against the liberty of the subject, and this is a new power given only in particular cases; this is not one of them, and therefore not within the statute. Whereupon the warrant was superseded, and the marshal directed to go to *Newgate* and take him into his custody again, as was done in *Sir Thomas Tippin's* case.

Aires *vers.* Hardrefs.

If execution be taken out within the year, it may be continued down, and a new execution *sans scire facias*.

A *Fieri facias* was taken out within the year, and a *nulla bona* returned; this is continued down for several years, and then a *capias ad satisfaciendum* issued. And whether that be regular or no was the question. The court took time to inquire, and the last day of the term the C. J. said, If this were a new case they should think it hard to take away all *scire facias's*. But the practice had gone so far, that there is no overturning it now. 1 *Inst.* 290. 4 *Inst.* 271. *Mod. Caf.* 288. 1 *Sid.* 59. 1 *Keb.* 159. *Clift* 840. *Officina Brevium* 96. *Rastal* 164. Wherefore the execution was held regular.

Dominus Rex *vers.* Skingle.

Tithes are a tenement.

THE 43 *Eliz.* c. 2. charges lands, tenements, tithes, &c. to the poor's rate. By a private statute for erecting workhouses in *Colchester* the poor are provided for in another manner, and the occupiers of lands and tenements are made chargeable: And after a rate an appeal is given to the sessions. The defendant was parson and rated for his tithes, and appeals; and because the word *tithes* was not in the act of parliament, which the sessions looked upon as an absolute repeal of the 43 *Eliz. quoad Colchester*, therefore they discharge him. *Et per Curiam*: He ought not to be exempted but by express words, being liable before. Here he is an occupier of a tenement, for tithes are a tenement. 1 *Vent.* 173. 2 *Lev.* 139. *Lutw.* 1563. 1 *Inst.* 6. *Dy.* 83. *Litt.* §. 647. 32 *H. 8. c.* 7. *Co. Litt.* 159. *Cro. Jac.* 301. 2 *Inst.* 625. Wherefore the order of sessions was quashed. *Powell v. Bull*, C. B. this question determined in the same manner.

Dominus

Dominus Rex *vers.* Arnold.*At Nisi prius in Middlesex, coram Pratt, C. J.*

INDICTMENT against defendants, for that they being churchwardens and two others overseers *debite modo appunctuat*, did refuse to join with the overseers in making a poor's rate. And the C. J. held the prosecutor to shew an appointment of the overseers under the hands and seals of two justices, as the statute requires. And he rejected parol evidence, because he said it must be produced, that he might judge whether it was a sufficient appointment. He quoted *Willoughby v. Dixey*, in C. B. where a will entered in the spiritual court books to be delivered out to the executor, was refused to be read, till application and refusal of the executor was proved. And the same in *Sir Edward Seymour's* case as to a deed. Defendant acquitted.

No parol evidence of an appointment of overseers.

Baker *vers.* Lord Fairfax. Ibidem.

ON an issue out of Chancery one of the witnesses, after his depositions taken, became interested, and confessing it now upon a *voire dire* he was rejected. Then it was desired to read his depositions as if he was dead; and a case was urged, where in Chancery a witness was made executor and revived the suit, and was read at the hearing. But the Chief Justice remembered the case in *Salk.* 286. which was the resolution of two courts on a trial at bar; and so he refused to hear the depositions.

Depositions taken before, no evidence after witness becomes interested.

Dominus Rex *vers.* Bennett.

UPON the trial of an information in the nature of a *quo warranto* for exercising the office of mayor of *Shafesbury*, the jury found a verdict for the defendant; and upon a motion for a new trial great doubts arose, whether after a verdict for the defendant there could be any new trial, though the judge should certify (as he did in this case) that it was a verdict against evidence.

Court divided about a new trial in an information in nature of a *quo warranto*.

After the point had been twice spoken to in *B. R.* it was adjourned *propter difficultatem* to be argued before all the Judges of *England*, who being this term assembled at *Serjeants-inn* the following arguments were made.

Denton. New trials can only be granted by the superior courts, and not by any inferior ones. Trials at the assizes are subordinate trials, and under the inspection of the superior court out of which the record issues. In *Stiles* 466. which was the first new trial that ever was granted, it was said by *Glynne*, that the court in these cases has a judicial but not an arbitrary discretion. I must agree that generally no new trial shall be granted after a trial at bar, but yet in the *scire facias* against *Bewdley*, *Trin. 11 Annae*, which was brought to the bar, and the jury refused to find a special verdict, the court ordered a new trial.

1 Will. Rep.
207.

It is objected, that this is a criminal proceeding. But we say, that since 9 *Annae*, c. 20. it has a mixture of civil. The relator is liable to costs, and the statutes of jeofailes extend to it. And why should not this be considered in the same view as *Mandamus's*, upon which new trials are granted frequently. The original writ of *quo warranto* was merely civil. *Old N. B.* 107. *Sid.* 54, 86. 2 *Inst.* 282. *Rastal* 540. *Old Ent.* 133, 134. and upon that the franchise, which was a civil right, might be seized. Formerly indeed upon an information in the nature of a *quo warranto* the party could only be punished for the usurpation. *Yel.* 190. *Cro. Jac.* 260. 1 *Bulst.* 54. *Co. Ent.* from 527 to 564. but now judgment of *ouster* may be pronounced.

These rights are of a high nature, and it would be a great inconvenience, to tie them up stricter than actions. Suppose the jury should refuse to find a special verdict, or the judge should mistake the law; will there not be a failure of justice, if a new trial cannot be had? *Mich. 2 Geo. Rex v. Inhabitantes de Walthamstow*, in an indictment for not repairing the highway, and *Regina v. Inhabitantes de com' Wilts*, for suffering *Lacock-bridge* to be in decay, new trials were granted.

Pengelly serjeant. This is a discretionary question, wherein no defect of power is to be supposed. The defendant cannot plead Not guilty. 2 *Inst.* 282. 2 *Co.* 24. b. 28. b. *Hardr.* 423. *Cro. Jac.* 43. but must disclaim, or shew his right. It is the prerogative of the crown to determine civil rights by way of information. Thus the King brings his information of intrusion in the Exchequer, which is but a common ejectment. And so informations by way of *devenerunt*, which is in effect an action of trover; and in these cases new trials are every day granted. *Co. Ent.* 390 And in those cases there is a fine.

It

It will be no objection that the year is expired; for this prosecution was commenced within the year, and the judgment must be the same, because it is to avoid all mesne acts. *Co. Ent.* 527, 530. *Trin. 8 Ann. Regina v. Barber.* That was an information of this nature against the defendant, who claimed to be burghers of *Thetford*. There was judgment by default, and then came a pardon, which was held only to discharge the fine, but not the judgment of *ouster*. The fine here will be *salvo contentemento*, according to *magna charta*, and the bill of rights. Since the statute this has all the incidents of a civil prosecution, the commencement only excepted. Before the King only could have it, but now any private person may at peril of costs. If no new trial be granted, the crown will be in a worse condition than the subject: For here the verdict will be final, and no new information can be had.

Earl Serjeant contra. The only question is, whether this be a criminal or a civil prosecution. For on the one hand, if it be of a civil nature, I must agree a new trial may be granted: And on the other hand, it must be admitted, that if this be merely criminal, no new trial can be had.

It is not denied, but that at common law this information was a criminal proceeding; whether the statute has altered the nature of it is the doubt. We think it remains as it did before. The consequence of it is still fine and imprisonment, with this addition, that judgment of *ouster* may be given, which could not before; and because the statute has made it more penal than it was at common law, therefore say they it is now changed from a criminal to a civil nature. This is such an inference, as I cannot see into the reason of. But say they, the statutes of jeofails do not extend to criminal proceedings, but they extend to this; *ergo* this is not a criminal proceeding. I desire to know whether it will be pretended, that they would have extended to this case without the express provision of the statute. Certainly they would not. And the Parliament was aware of that, and therefore added that clause. The first new trial is *Stiles* 448. and there the witness died of an apoplexy. *Lord Townsend v. Dr. Hughes in C. B.* 2 *Mod.* 150. In *scandalum magnatum* a new trial was denied. Cannot the King release, pardon, or stop this prosecution? Surely he may. In capital cases the defendant may plead *autre foits acquit*; so careful is our law, that the subject shall never be bore down by the weight of the crown. 1 *Sid.* 405. 2 *Keb.* 403, 765. 1 *Lev.* 9. 1 *Keb.* 124. are cases where the defendant was convicted, and *in favorem libertatis* a new trial may be granted. *Mich. 3 W. & M. Rex v. Davis*, 1 *Show.* 336. in an information for a riot a new trial was denied. *Mich. 7 W. 3.*
Smith

Salk. 652.

Smith v. Frampton, Salk. 644. in an action for negligently keeping his fire, wherein the defendant was acquitted, it was refused to be tried again. Indeed *Pas. 4 Jac. 2. Rex v. Simpson et al'*, information for seditious words, after acquittal a new trial was granted, but whoever observes the time that case happened, and that it was denied for law by *Holt* in *Davis's* case before cited, will think it of little weight. *Pas. 2 W. & M. Dr. Salmon's* case, the defendant was convicted of perjury, and had a new trial; but the court said it would have been otherwise if he had been acquitted. *Pas. 5 Ann. Regina v. Clarke*, in an indictment for a nuisance, after acquittal the court denied a new trial, till the defendant came in and consented. It was granted in *Sir Jacob Banks's* case, only because he had carried it down by proviso, which could not be against the crown. *Mich. 3 Ann. Hartness v. Sir J. Barrington*, after the defendant had been acquitted of an assault, a new trial was denied. So *Salk. 646.* after acquittal for a libel.

In this case the office is determined, so there can only be a fine and imprisonment. And if one new trial may be had, the same reason will hold for a second and a third, and no body can say where it will stop. It may happen that the defendant may be convicted on a second trial, for want of that evidence which acquitted him before. The case of *Bewdley* was only a *scire facias*, which is a proceeding purely civil.

Yorke. This question is of far greater consequence to the subject than the crown. It consists of two parts:

1. Whether a new trial can be granted in any of those cases.
2. Whether there be any particular circumstances in this case, to distinguish it from the general ones, and so induce the court to refuse it.

First, When new trials first came in, they introduced a great alteration. The case of *Fenwick v. Holt* (which was an information, and not an indictment as some of the books say) is full in point; and the court said they could not do it without altering the law, which shews there is not a discretionary power. This is the rule in criminal cases, which I shall shew this to be. At common law usurpations were a crime, a contempt to the King, and an oppression of the subject. A *quo warranto agit in rem*, an information in nature of a *quo warranto in personam*. The first charges a crime, and the other a user of the franchise. This is all of the crown side, which the civil rights of the crown are not, as *quare impedit*, which are of the plea side. The replication concludes,

petit

petit quod convincatur; and so is *Co. Ent. tit. quo warranto*; now conviction implies crime. This cannot be called an action, the prosecutor neither demands nor recovers any thing, *et actio nil aliud est quam jus prosequendi in judicio quod sibi debetur*.

When proceedings in eyre dropt, then informations came in, which are of a higher nature than the proceedings in eyre. 2 *Inst.* 282, 498.

The statute 9 *Ann.* takes notice of this as a criminal proceeding: As for the costs, they are collateral, and cannot change the nature of it. The 4 & 5 *W. & M. c.* 18. gives costs in perjury, where presented as a misdemeanor by information; and can any one say it is now become a civil prosecution? In the case of *Strode v. Lill. Ent.* 248; *Palmer* it was held, that *mandamus's* would not come within the description of *actions*, so as error might lie in the Exchequer Chamber.

The jury may take the law upon them if they will. *Litt.* §. 368. The relator here is only appointed for the security of the costs. In the case of *Ilchester* he died, and thereupon the defendant moved to stay the proceedings: No, says the court, this is the cause of the crown. I omit his argument from the facts in this case.

Denton replied, The clause of jeofails was only thrown in, in *majorem cautelam*, as declaratory of the law.

Pengelly. Sir T. Jones 163. new trial after conviction of perjury.

Afterwards in *B. R. Pratt* C. J. declared, that they had called in the assistance of the other Judges, and that upon the whole they were equally divided; so no rule for a new trial could be made. The division, as I was informed, was thus: For a new trial, in *B. R. Pratt* and *Eyre*; in *C. B. King* and *Tracey*; in *Scacc. Price* and *Montagu*. Against a new trial, in *B. R. Powys* and *Fortescue*; in *C. B. Blencowe* and *Dormer*; in *Scacc. Bury* and *Page*.

Long *vers.* Buckeridge.

Intr. de Trin. 1 Geo. rot. 555.

Attornment,
where neces-
sary.

REPLEVIN for taking the plaintiff's goods and chattels in the parish of *St. Botolph Aldgate* in his shop there. The defendant avows the taking by distress for a fee-farm rent, and says, that King *James* the First by letters patent dated 24 May, 7th of his reign, *dedit et concessit* the premises (*inter alia*) to the grantees therein named, *habendum* to them and their heirs for ever, *tenendum* of him and his successors, as of his manor of *East Greenwich* by fealty only, in free and common socage, and not *in capite* or by knights service, *reddendum* to the King and his successors the yearly rent of 22 *l.* in lieu of all rents, services and demands issuing out of the premises. That King *James* being so seised of this rent in right of his crown, by letters patent, 19 January, 9th of his reign, gave the said rent and services to *Lawrence Whitaker* and *Henry Price*, and their heirs. That *Henry Price* died, and *Whitaker* survived and was sole seised, and made his will, from whence and from a great many *mesne* conveyances (as a fine to the use of the conusee, and a devise by him) the avowant brings down a title to himself; and then goes on and says, that he was seised in fee of this rent, and avows the taking for arrears, and prays judgment and a return. To this the plaintiff has demurred, and the avowant has joined in demurrer.

This cause was formerly spoke to at large, and the opinion of the court with the avowant. Only they reserved one point to be further spoke to, whether the avowry is ill for want of alleging an attornment of the terretenant upon the fine levied of the rent in question by *James Bewly* and his wife to *William Buckeridge*, under a devise from whom the avowant claims.

Yorke pro querente argued, that the avowry is ill, which depends on two considerations:

1. Whether *William Buckeridge* the conusee, who is alleged to be seised by vertue of this fine, was in at common law, or by the statute of uses. For on the one hand it is plain, that if he was in at common law, though the rent passed by the fine, yet it did not enable him to distrain without attornment; and on the other hand it is as plain, that if he was in by the statute of uses, then no attornment was necessary.

2. Supposing

2. Supposing he was in at common law, whether here is any other matter appearing upon this avowry subsequent to the fine, which has cured this defect, and taken away the necessity of attornment as to the avowant.

As to the first it is to be observed, that this is a fine levied to the conusee and his heirs, and it enures by way of grant of this rent, and after it is set out, there comes an averment that it was to such use.

If the matter had rested upon the words of the concord itself, there would have been no doubt but he would have taken at common law; for it is a common law conveyance of the rent to him, and he must have been taken to have both the legal estate, and the use, which is the profitable interest, unless something further had appeared to control that intendment, and give it a contrary construction. So it was held in the case of *Lord Anglesey v. Altham*, *Pas. 8 W. 3. B. R. Salk. 676*. There a fine was levied, and afterwards a common recovery suffered, wherein the conusee of the fine was tenant; and there being no deed to lead the uses, it was objected, that the use of the fine resulted to the conusor. But the court held, that it should be intended to the use of the conusee, and in pleading need not be averred; and so is *Co. Ent. 114, 273. Plow. 477*. But if it were to the use of the feoffor or conusor, then it must be averred. Latch 257,
266.
Palm. 483.

Shortridge v. Lamplugh, *Mich. 1 Ann. B. R.* the question was upon pleading a conveyance by lease and release, where no consideration was shewn, nor express use averred, whether it should be taken to go by way of resulting use to the releffor; but the court held, it should not, unless it were expressly shewn, but that the estate and use vested in the releffee. 2 Mod. Ca.
71.
Salk. 678.
Far. 71.

If this be the proper construction upon the face of the fine, then the subsequent averment, that it was to the use of the conusee and his heirs, will not alter the case, nor make him to be seised by force of the statute of uses. For there is no room for the operation of that statute, nor can it have any effect which the common law could not fully have without it.

Before the statute of uses, interests in lands fell under the consideration of the *legal Estate*, which was the possession; and the *use*, which was barely a trust, an equitable right to receive the profits. These might subsist in different persons, and he who had the use had no remedy but in Chancery. But on a gift to J. S. and

and his heirs, he would have had both the possession and the use; for he could not be said to be a trustee for himself, but the use would have merged in the possession.

Thus it stood at common law when the 27 *H. 8. c. 10.* was made; and that only operated, where the possession and use were divided, and drew the possession to the use, and not the use to the possession. But as to persons who had both the possession and the use, as they needed not the help of the statute, so it left them where it found them.

N. B. Where the fine is to *A.* and his heirs to the use of *A.* and *B.* in fee. They are both in by the statute of uses. *Hutt. 112.*

The result of this is, that no person can be said to be in by the statute of uses, but he who before would have only had the trust; but in this case the conusee would have had both the legal estate and the use, and therefore he cannot be seised by the statute of uses. And this distinction is warranted by the authorities. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. And in *Co. Litt.* 309. *b.* it is said that if a fine be levied of a seignory to another to the use of a third person and his heirs, he and his heirs shall distrain without attornment, because he is in by the statute of uses. By which it appears, that it being to the use of a third person, that makes him in by the statute of uses.

2. Supposing the conusee in at common law, and that he would have wanted an attornment to enable him to distrain; whether any other matter appears, to have cured the want of it as to the avowant.

It has been insisted, that the conusee devised it by his will under which the avowant claims, and that attornment is not necessary on a devise.

Attornment, what.

This will be answered by considering the nature and reason of attornment. An attornment is the agreement of the tenant to the lord's conveyance of the seignory to another hand. *Co. Litt.* 309. *a.* The reason is, that by the common law there ought to be a privity, that the tenant may know who to pay his rent to, and whose is a lawful or a tortious distress. *Vaugh.* 39. And this privity is originally created by the tenant's accepting the tenancy.

But then the lord could not by his own act alone subject the tenant to the distress of another; and therefore if he granted away the seignory, the privity was destroyed, till the tenant had attorned by his voluntary agreement, or was forced to it by a *quid juris clamat*, or a *per quae servitia*, against which he might have his proper defence. And this privity was necessary to be continued on through every conveyance. *Yelv.* 135.

And

And attornment was of such necessity, that by a grant *in pais* nothing passed without it, though by a fine indeed such things as lay *in prendre* passed, but not such as subsisted *in jure tantum*, as a privity to distrain. *Co. Litt.* 320. a.

This was the case of him who came in by the act of the party only, but not where he came in by act of law, as the heir by descent, tenants in dower, courtesy, statute-merchant, or *elegit*, devisee, or lord by escheat. The ground for all this is, that they had no means to compel attornment, and 6 *Co.* 68. a. my lord *Coke* gives this rule, *Quod remedio destituitur, re ipsa valet, si culpa absit*. So that he who would distrain without attornment, must stand clear of all laches, which this conusee does not, for he has slipt his time of bringing a *quid juris clamat* or a *per quae servitia*, which must be before the ingrossment of the fine. *Bro. Quid juris clamat*, 355. *F. N. B.* on the writ of covenant to levy a fine. *Plowd.* 431. b. *Pop.* 63.

And as the conusee shall not distrain, so his devisee shall not, for *nemo potest plus juris ad alium transferre quam in ipso est*. The bargainee of this conusee could not distrain, though he would come in by the statute of uses. *Co. Litt.* 309. b. 5 *Co.* 113. a. The reason of which is, that though the statute supplies such a defect in the bargainee's title, yet it meddles not with the bargainor's. And besides, there is an interruption of the privity, which ought to have been handed down through all the grants. *Cro. Eliz.* 832, 354. *Ow.* 23.

A devisee cannot be in a better condition than a bargainee by deed inrolled. I agree an attornment is not necessary to a devise; and the reason given upon *Litt.* §. 586. is, that the tenant shall not have it in his power, to frustrate the will. But here, requiring an attornment doth not give the tenant that power, it only puts it in the power of the devisor to defeat his own devise by his own laches.

In *Cro. Eliz.* 354. the case of a lord by escheat and a devisee are coupled together, but surely they stand upon different reasons. In the case of an escheat the privity continues, for the tenant comes in *mediately* subject to the superior lord, whose title is paramount to the tenant's, which a devisee's is not, for he comes in under the title of the devisor, and is not a person to whom the tenant made himself subject either *mediately* or *immediately*.

It was objected, that this was but matter of form, and should have been shewn for cause of demurrer. But I answer, that this is a necessary circumstance to give a power to distrain, and is here the very merits of the cause.

It was said, a verdict would have cured this defect, but I deny that, for by the fine the thing granted passes without attornment, and the jury may find *concessit* without it. Though in a grant by deed I agree a verdict would have helped it; because there nothing passes till attornment. *Raym.* 487.

Squib contra. I agree the conusee is in at common law, and that where the use passes to the same person, the statute has no relation. Seignories were at first instituted on a military account; and therefore attornment was brought in, that the tenant might not be obliged to serve under a stranger in the wars.

Though the conusee could not distrain without attornment, because he could compel it by a *quid juris clamat, per quae servitia*, or *quem redditum reddit*, yet we are in the case of a devisee, who has no means to compel attornment, and that is the reason why a devisee may distrain without it. *Litt.* §. 586. 1 *Inst.* 322. One that claims under letters patent may, and so may any body to whom no laches can be imputed. 6 *Co.* 68. 5 *Co.* 113. 39 *H.* 6. 24. *Bro. Attorn.* 29. 5 *H.* 7. 19. Lands devised from the heir vest before agreement, *et interest reipublicae suprema hominum testamenta rata haberi.*

But admitting attornment ought to have been set out; then I insist, that it appears sufficiently upon this record, and that an attornment is implicitly averred. For if attornment be necessary, then he could not be seised by force of the fine, and it is said *quod virtute inde* the conusee *seisitus fuit* of the rent; neither can that part of the avowry be true, which says, that the plaintiff became *onerat* with the payment of the rent to the avowant, which he could not be, unless the avowant had a title to distrain, and he could have no title without attornment.

But even admitting that attornment was necessary, and that none appears upon this record; yet the want of it should be shewn for cause of demurrer, for it is but a circumstance and matter of form, since the act for the amendment of the law; and there appears sufficient for the judges to give judgment according to the very right of the cause.

Yorke replied. The tenant might defend himself in a *per quae servitia*; and to give the devisee a power to distrain, where the devisor had not, is to oust the tenant of his defence. Suppose the conusee had devised it immediately and died, would not there have been a new lord put upon the tenant without his privity or consent? I agree, in an action of debt for this rent, the attornment would have been but a circumstance; for the rent passed by the fine, but not a power to distrain for it. And as to what is said about *seisitus* and *onerat*, I admit it to be true, that he was seised of the rent by force of the fine only, but had no power to distrain. *Adjournatur*; and in a few days

Pratt C. J. delivered the resolution of the court. This case is now reduced to a single point, whether it was necessary for the avowant to set out an attornment upon the fine to *William Buckeridge*, under a devise from whom he claims. We are all of opinion, that for this fault the avowry is ill. It seemed to be given up at the bar, and therefore I shall but lightly touch upon it, that the conusee was in at common law. The fine is a common law conveyance, by which both the legal estate and the use would have passed to the conusee, without any declaration of uses, according to the case of lord *Anglesea v. Altham*; and therefore the uses need not have been averred, it is but *expressio eorum quae tacite insunt*; whereas if it had been to the use of a third person, they must have been averred, in order to controul the general operation which the fine would otherwise have had. This conusee did not want the help of the statute, and therefore it meddles not with him, but leaves him in at common law. 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. *Co. Litt.* 309. *b.*

Since he is in at common law, it is not disputed, but that attornment was necessary to enable him to distrain; but the avowant says, he is in the case of a devisee, and on a devise no attornment is necessary. This is true, that generally a devisee shall distrain without attornment, but then his devisor must have been enabled. If he had not that power, he could not transfer it, according to the rule in *Sir Moyle Finch's* case, *Nemo potest plus juris ad alium transferre quam in ipso est*. This rule holds in all sciences, in logic *Nil dat quod in se non habet*; a bargainee has no more privileges than his bargainor, and of the two, he is to be favoured before the devisee. 5 *Co.* 113.

The case of a devisee and lord by escheat are unskilfully coupled together in *Cro. Eliz.* 354. as was mentioned at the bar; and though in the latter end of that case there falls an expression
obiter

obiter, which seems to make for the avowant; yet that can have no weight; it is tenderly said, and is directly contrary to the principal case. There is no doubt but the lord by escheat may distrain without attornment, for he claims by title paramount, and the old privity revives. *Mallorie's case*, 5 Co.

And as we think it necessary, an attornment should be set out; so we are likewise of opinion, that none appears upon this record. The conusee was *seifitus*, and the tenant *onerat'* by the fine only; but that passed no power to distrain. If this had been by deed, an argument might have been drawn from those words, because there nothing would have passed before attornment. We think likewise, that this is matter of substance, and so the avowry is ill on a general demurrer.

Reeve prayed to discontinue, because the avowant is as an actor. *Sed per Curiam*: It is the plaintiff's suit, and how can one man discontinue another's suit. *Judicium pro quer'*.

Michaelmas

Michaelmas Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Nicholas Lechmere, *Esquire, Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

Brooke *vers.* Ewers & ux'.

YORKE moved for a *mandamus* to the Judge of the court of *Mandamus in Sandwich*, to give judgment upon a verdict, though he had *nature of a procedendo ad judicium.* granted a new trial for excessive damages without payment of costs. And for the *mandamus* he quoted 1 *Ven.* 187. *Raym.* 214. 2 *Keb.* 871. And he likewise insisted, that a Judge of an inferior court cannot grant a new trial, as was held by *Holt C. J. Mich.* 1 *Ann.* *Hall v. Hill*, 7 *Mod. Ca.* 84. *Salk.* 201, 650. And likewise by *Parker C. J. Pas.* 12 *Ann.* *Page v. Round*. And to that opinion the court inclined, and granted a *mandamus* unless cause, and upon that the Judge below, as well advised, *quievit.* A Judge of an inferior court cannot grant a new trial.

Between the Parishes of Beafon in Nottinghamshire and
Sciffon in Leicestershire.

Order to re-
move *A.* and
family bad as
to family; but
adjudication
that it *was* the
place of the
last legal set-
tlement is well
enough.
Salk. 473.

ORDER for removal of *Thomas Block* and his family from *Beafon* to *Sciffon*. And the justices adjudge, that *he* is likely to become chargeable, and that *Sciffon* *was* the place of his last legal settlement. Upon the first reading it was quashed as to the family, *quia* too general: *Salk.* 482, 485. But the question now debated was, whether there was a sufficient adjudication of a settlement in *Sciffon*; for it is not that it *is* the place of his last legal settlement, but that it *was* so, which might be twenty years ago, and he may have gained another settlement. And some stress was laid upon the variation of the expression in the order *is* and *was*, as if the justices designed they should have a different construction. And the court now inclined this part of the order to be bad, till *Eyre J.* quoted a case between the parishes of *Lanbaddock* and *Languined*, *Mich.* 2 *Geo.* or *Hil.* 2 *Geo.* where it was, *are* likely to become chargeable, and that *Languined* *was* the place of settlement; and this exception taken and over-ruled. And upon this authority the order was confirmed as to *Block* himself, but the Chief Justice and *Fortescue J.* said, if it had been *res integra*, they should have doubted.

Stratton *vers.* Burgis.

Amendment.

AN attorney undertakes to appear for the defendant an infant. *Et per Curiam*, He is obliged to do it in a proper manner, and having entered it *per attornatum*, when it should have been *per guardianum*, it may be amended.

Lewis *vers.* Farrel.

In case for
malicious pro-
secution must
shew proceed-
ings deter-
mined, and
how.

IN case for a malicious prosecution of an indictment, judgment was given for the defendant on demurrer, because it was not shewn how the indictment was determined, according to the cases of *Parker v. Langley*, *Trin.* 12 *Ann.* B. R. and *Blagrove v. Odell*, *Mich.* 3 *Geo.* *ro.* 228.

Dominus

Dominus Rex *vers.* Guardianos ecclesiae de Thame in
com' Oxon'.

MANDAMUS directed to the churchwardens of the parish of *Thame*, to restore *John Williams* to the office of sexton there.

On a *mandamus* to restore an officer who is in at pleasure only, it is a good return to say it was their pleasure to remove him, and in such case a summons is not necessary.

They return, That the parish of *Thame* is an ancient parish, and that for time immemorial there has been a church, with churchwardens, and a sexton, eligible by the churchwardens and parishioners, or the major part of them, for that Purpose at a day and place prefixed assembled; which person so elected was to continue in at the pleasure of the electors, and was always amoveable by the major part in form aforesaid assembled. That 1 *May* 1703. *John Williams* was elected sexton, and continued in the office till 31st of *July* 1717. upon which day the churchwardens and parishioners being duly assembled, *ad continuandum vel amovendum* the said *John Williams*, he at such assembly was by the churchwardens and major part of the parishioners removed from his said office, *et ea de causa* they cannot restore him.

Denton argued, that the return was insufficient. This is not a case within the *mandamus* act, so as we might traverse the return; and therefore it must be certain to every intent. It must answer all the suggestions of the writ, which this return does not: We lay that we were *debite electi praefecti et admissi*. into this office: They answer to the *electi* and *praefecti*, but not to the admission: For though that may be implicitly taken to be answered, yet returns by implication, and such as are argumentative only, are not good. *Raym.* 365, 153, 431. 1 *Sid.* 286. 2 *Jones* 177. The cases of 2 *Sid.* 49, 79. 1 *Ven.* 77, 82. *Raym.* 188. 1 *Sid.* 461. 2 *Keb.* 641. will be objected to me; but I give them this answer, That they were upon letters patent, where the appointment was only *durante beneplacito*; but we are here in the case of a custom, which is more unconfined; and 2 *Cro.* 540. a custom to remove a man *from his freehold* was held void. It does not appear the party was heard, or that the parish is supplied with another officer.

Yorke contra. Wherever an officer appears to be in only at pleasure of the electors, it is sufficient to shew a determination of their will. 1 *Lev.* 291. 1 *Ven.* 77, 88. 2 *Keb.* 641. And those cases being of a grant, the argument is stronger in this case; for many things are good by custom, which are not so by grant. Where the power is to remove without cause, no cause of removal need be returned. And for this reason also no summons or hearing of the party

party is requisite, for he is not removed for any crime. And whether the office is filled up or not is nothing to this man, nor can better his title a whit. The admission is not the point of the writ; but if it were, yet the *elect' et praefect'* is a full answer. He could not be *praefectus*, unless he was in possession of the office: So that when we shew him in possession, that necessarily implies a previous admission.

No *mandamus* lies for an officer at will. 2 *Lev.* 18. *Salk.* 428, 432. There appeared to be a power of removal at pleasure, but because the removal was for faults in his office, and not in pursuance of that power, a peremptory *mandamus* went: But it was held, that it had been good, if they had relied only upon their power.

The court held the return good. *Et per Pratt C. J.* The admission need not be answered, though it is fully done by *praefect'*: Nor does there need any summons, for the reason mentioned. *Et per Powys J.* a charter cannot hinder a man from setting up a trade without apprenticeship, but a custom may. *Et per Fortescue J.* a sexton is called *ostiarius*: We ought not to grant a *mandamus*, without a certificate that the sexton was chosen for life. If he were removed for a crime, a summons is requisite according to natural justice; but the present case is a removal for what the party cannot gainsay.

Henderfon *vers.* Williamfon.

Award must pursue the submission in point of form as well as in point of substance.

DEBT upon a bond, conditioned to perform the award of *J. S.* so as it be made in writing under his hand and seal by such a day ready to be delivered to the parties. The defendant after *oyer* pleads, *nul agard fait*. The plaintiff replies, that the arbitrator before the day made his award in writing, which is set out, and a breach assigned. And to this replication the defendant demurs generally. And *Comyns* Serjeant objected, that it did not appear to be under the hand and seal of the arbitrator, as the submission requires. *Bulst.* 110. 1 *Roll. Abr.* 145. *Vaugh.* 109, 112. *Palm.* 121. 2 *Cro.* 277. And for this fault it was held ill: But the plaintiff had leave to discontinue.

Anonymous.

Variance.

C*ertiorari* to remove a conviction of forcible entry and detainer against *A.* and his wife: The conviction returned was against *A.* only: And for this variance the *certiorari* was quashed. *Vide Salk.* 146, 151. Dominus

Dominus Rex *vers.* Roe & al'.

YORKE moved to quash the return of a rescous, by which it appeared, that the warrant was to two, and the arrest only by one, without any words to sever the authority. *Sed per curiam*, Though that be an exception in the case of a private authority, yet it is none in this which relates to the publick justice; and this has always been the standing distinction, and therefore the return is good. *Vide 1 Inst. 181. b.*

An authority to two to do an act relating to the publick may be executed by one only.

King qui tam *vers.* Bolton.

THE plaintiff declares in prohibition, setting forth that the city of *London* is an ancient city incorporated by the name of mayor, commonalty and citizens of the city of *London*, and that time out of mind there has been a common council consisting of the mayor, aldermen and certain citizens to the number of 250, elected within their respective wards yearly upon *St. Thomas's* day at the wardmote: That there have been usually twelve chosen for the *Tower* ward, and that the plaintiff on *St. Thomas's* day last, being a citizen and freeman inhabiting in that ward, was at a wardmote holden before the alderman duly elected and admitted a common council man for the year ensuing: But the defendants, in order to oppress him, 6 *February*, 4 *Geo.* did deliver a petition to the court of common council, complaining of an undue election, and suggesting that they themselves were chosen; whereas the plaintiff avers, the common council had no jurisdiction to examine the validity of such election, but the same belongs to the court of the mayor and aldermen; and notwithstanding the plaintiff offered to prove the same, yet the defendants proceed against him, and concludes with averring the contempt. The defendants deny the contempt, *et quicquid, &c. et pro consultatione habenda* they admit the constitution, and manner of election; but then they say, That the mayor, aldermen and common council, time out of mind have had the cognizance and authority of hearing and determining the election of common council men: That on *St. Thomas's* day the defendants were duly chosen, but the plaintiff and one *Jeffes* pretending a right, intruded themselves into the said office, whereupon the defendants exhibited their petition to the common council, *prout eis benelicuit, absque hoc* that the jurisdiction is in the court of the mayor and aldermen. The plaintiff, *protestando* that the court of mayor and aldermen have a jurisdiction, for plea says, the common council have it not: And concludes to the country. To this replication the defendants demur, and shew for cause, that the replication is a

Where the first traverse is immaterial, there may be a traverse upon it. Lill. Ent. 523.

departure, and that the plaintiff ought to have taken issue on the traverse, and not answered the matter of it barely by way of inducement. The plaintiff joins in demurrer.

Darnall Serjeant *pro defendant*. The plaintiff should have taken issue upon our traverse, and not meddled with the inducement to it. *Cro. Car.* 105. *2 Mod.* 183. He shall maintain matter alleged by him, and denied by the other side, and not go over to matters *dehors* and collateral, arising only out of the inducement to the other's plea. *Vaugh.* 60. *2 Mod.* 84. He shall not desert his own title, and recover upon a defect in the defendants. It is not enough for him to destroy my title, but he must go farther, and establish his own: If he does not he can never recover, for *melior est conditio possidentis*. *Hob.* 101. He that prays a prohibition, must prove his suggestion, as on *modus's* and citations out of the diocese. He that pleads in abatement, must give the plaintiff a better writ: Therefore when they say we have applied to an improper court, ought they not to shew us which is the proper one? and can that be determined, unless it be put in issue?

Whitaker Serjeant *contra*. This is a prohibition *pro defectu jurisdictionis*, and not barely *pro defectu triationis*. Here both plaintiff and defendant are actors, the one sues for damages by being drawn into an improper court; and the other labours for a consultation, and for that purpose must intitle the court wherein he sues to jurisdiction. *Plow.* 469. a. *Dy.* 170, 171. *2 H.* 4. 9, 10. For the only point is, whether or no the defendant has sued the plaintiff in a court that can and ought to determine the matter. The traverse is immaterial: We say the court of common council has no jurisdiction, and is it any answer to say the court of aldermen have none? We might safely have demurred, but we chose to waive that, in order to bring the right to trial. And though generally a traverse upon a traverse is not allowed, yet that rule does not hold in all cases. *1 Inst.* 282. b. *Cro. El.* 99. *Mo.* 429. *Cro. El.* 407. *2 Cro.* 372. *Pop.* 101. This is not like the case of a *quare impedit*, which has been mentioned, for there the plaintiff must make a title, in order to have a writ to the bishop.

Darnall replied. Suppose we had demurred to the declaration, and it had been held naught; should not we have had a consultation, without making out a title? They that take a cause from one court, must shew a jurisdiction in another: They say we have applied wrong, why? Because you should have gone to the court of aldermen, so that that's the point, whether the court of aldermen have the right.

C. J. I did not expect to have heard an argument in so plain a case as this. The plaintiff says he is sued in the common council for a matter whereof the cognizance is only in the court of aldermen: consider now what is the ground of our sending a prohibition; it is not because the court of aldermen have a right, but because the common council has none, and therefore the traverse, which would avoid trying the right of the common council, and bring that of the court of aldermen in question, is immaterial. For suppose they had gone to issue upon that, and it had been found that the court of aldermen had no jurisdiction; yet that had not established the right of the common council, so as to intitle the defendants to a consultation. Whether they shall have one or not, depends upon the right which the common council has to determine this matter; and if they have none, I am sure we ought not to remit this cause to them, though the court of aldermen should fail of establishing their right. Though the plaintiff might have demurred, yet he was at liberty to go on to try the right. The cases where a plaintiff must recover upon his own strength, do not at all govern this; for if the common council have usurped a jurisdiction, which they have not; the plaintiff might have had a prohibition, without setting out where the right was. In the case of a *modus* it is otherwise indeed, because there the court below has originally a jurisdiction, which the other comes to overthrow by matter *ex post facto*. For these reasons I am of opinion, the prohibition ought to stand. To all which *Powys J.* agreed. *Et per Eyre J.* The plaintiff in overthrowing the jurisdiction of the common council has no need to set up another in opposition to it. Where the first traverse is immaterial, that is, where it will not put the proper point in issue, there may be a traverse upon that traverse.

Fortescue J. The defendant is properly the actor, because he must make title to the jurisdiction in which he sues; and whether that court has jurisdiction, is the only matter issuable; and not whether the plaintiff has alleged it properly elsewhere. The case of a *quare impedit* is intirely different from this case: there the plaintiff, as here the defendant, must recover upon his own strength, one his writ to the bishop, and the other a consultation. But the defendant there, and so the plaintiff here, needs make no title. If the right of the court of aldermen had been in issue, consider what would have followed. If their right had been established, it is no consequence that the common council have none, for there may be concurrent jurisdictions. If it had been found they had no right, does it follow that it is in the common council? That could not have intitled the defendants to a consultation. *Judicium pro quer'.*

N. B. This judgment was afterwards affirmed upon a writ of error in parliament. Dominus

**Dominus Rex *vers.* Grant, Majorem de Taunton in
Com' Somerset'.**

Quære,
Whether
there remains
any obliga-
tion at this
day for offi-
cers of corpo-
rations to
make the de-
claration
against the
solemn league
and covenant.

UPON an affidavit, that the defendant at the time of taking the oath of office did not take the declaration required by the corporation act of the 13 *Car.* 2. against the solemn league and covenant, a rule was made, that he should shew cause why an information in the nature of a *quo warranto* should not go against him. And upon shewing cause:

Cheshyre Serjeant before he came to the principal matter made two previous points. 1. That no private person could apply for this information; and, 2. That in case he might, the affidavit was not sufficient.

First, It will not be contended, but that in this case the court upon the statute of 9 *Annae*, c. 20. has a discretionary power, either to grant or deny an information. The party is enabled to file it with leave of the court, that is upon application to it. He must pray to have it, and every prayer implies a power to deny. A *quo warranto* is the king's royal writ of right, which Mr. Attorney may exhibit whenever he pleases. *Yelv.* 192. 1 *Bulst.* 55. But no private person has such an unlimited power, not over informations in the nature of a *quo warranto*. The statute is calculated for the determination of private rights, where any dispute happens upon elections of members, and it was made chiefly with this view, as may be collected from the preamble and other parts of the act, which require a relator to be named, who shall be liable to costs, and extend all the statutes of jeofailes to these proceedings. He that prays the information, must lay some right to the office before the court, that it may appear the prosecution is not set on foot merely to gratify the humour and captious disposition of the prosecutor. My Lord Chief Justice *Holt* has censured actions which have been brought out of curiosity only to try the opinion of the court, saying he did not fit there to determine coffee-house disputes. The election of the defendant was unanimous, no competitor at all; so that there is no one but himself who claims a right to this office. It has been held criminal, to bring an action in another's name without his privity and consent. Here the prosecution is in the king's name, and yet he is not privy. His attorney does not appear to avow the prosecution.

Secondly, The affidavit may be true, and yet the defendant may have taken the declaration as the statute requires, for he might take it

it before two justices at a different time from his taking the oath of office. Neither does it set out any tender of this declaration to the defendant, which is expressly required by the purview §. 10. and though the proviso seems to carry it farther, yet it will be absurd to make the purview void by the proviso. *Mich. 8 W. 3. B. R. Rex v. Major' de Oxon'. 5 Mod. 360.* That was a *Mandamus* to restore *Job Slatford* to the office of town-clerk. They returned that he did not at the time of taking the oaths of office take the oath of allegiance. It was insisted, that a tender was necessary; but this was not the point upon which the case turned, but because they only said he did not take them at that time, without any negative words that he did not take it at any other time, which he well might. And for this reason a peremptory *mandamus* was granted. This case enforces my objection to the affidavit, and before I leave it I must observe, that though all the then great lawyers were concerned in it, yet not one of them ever thought of this declaration, which is now trumped up to sacrifice the quiet of the whole kingdom to some private pique and revenge. Salk. 428.

As to the principal point (and a great point it is) I hope no information shall go, for three reasons. 1. Because this declaration has been disused for these thirty years past. 2. From probable reasons to induce an opinion, that this statute is expired: and, 3. From the consideration of the many inconveniencies which a contrary determination will bring along with it; and the evil influence it will have to inflame the nation.

First, Sir *James Mackenzie* and Sir *David Dalrymple* in their treatises of the laws of *Scotland* tell us, that desuetude of a law for forty years amounts to a repeal of it. And since no prosecution has hitherto been set on foot upon this act of parliament, it is, according to *Litt. §. 108.* an argument, that none lies; and as this law has been so long esteemed to be of no force, I may properly apply, what my lord *Coke* has more than once mentioned, *a communi observantia non est recedendum; et periculosum existimo, quod bonorum virorum non comprobatur exemplo.* Vol. of Trials 291.
Lord Balmerino's case.
Treatise of Laws 119.

Secondly, There are many reasons to conclude this statute is expired, and all put together are sufficient, *nam quae non prosunt singula, junta juvant.* It is the reason and subject matter which guides the construction of acts of parliament, and from hence spring all those instances which might be shewn, where general terms have been restrained to particular, and particular extended to general: where the words have reached all actions, and yet been confined to one species only; where statutes mentioning the king have enured to the benefit of the subject; and on the contrary where acts of parliament

ment penned with latitude enough to include the subject, have notwithstanding been restrained to the king; where the plural number has stood for the singular, and the singular for the plural; nay even where the same words in the same law have had different constructions put upon them. 4 *Inst.* 330. 2 *Inst.* 25. *Hob.* 128, 299, 346. As suppose a man having an inheritance in one acre and but a freehold in another, conveys both to J. S. and his heirs for ever. Here *for ever* must be construed differently. 7 *Co.* 23. *Cro. Eliz.* 183.

The intention was but temporary, as appears by *Kennet Vol.* 3. 138. Though never so many had taken the covenant, yet the extent of one life would wipe them all off. The candles were all lighted at once, and would burn out as soon as a single taper. It was confined only to persons then in being, who may reasonably be supposed to be all dead at this day: and as it was calculated chiefly for those who had taken the solemn league and covenant, it will be of no use now. The statute of uniformity 14 *Car.* 2. c. 4. which expressly determines it in 1682, induced a belief that it had the same continuance in all cases. And to shew this was not thought so considerable a thing as some people would make it, it is observable that it is left out in the militia act. I cannot pretend there ever was any express repeal, but if 1 *W. & M.* c. 8. be not one as to this declaration, I question whether it be so of the oaths themselves. If the clergy were to take it but for a time, and the militia not at all, what reason is there to construe this obligation with a greater latitude to corporations? The danger is the same in each case, and so is the security to be against it.

Thirdly, There are many inconveniencies which will flow from an opinion that this law is still in force. I forbear to mention some of them, and shall only instance in those which are obvious to all the world. Many corporations will be utterly dissolved; the public peace endangered, and the course of justice interrupted in all inferior jurisdictions. In some respects it may affect our legislature. How many will there have been, who have suffered under a sentence which the recorder of *London* had no authority to pronounce? The parliament is now sitting, and thither the proper application will be, as to the expertest physicians, who ought to have a hand in cutting off so many members, that there be no fever or consumption. It is not the first time this court has said, that matters which have come before them have been too big for them. In *Edward* the third's time the sheriffs took an oath against the *Lollards*, but when that came to be the established religion, it was dropped. 3 *Inst.* 188. 2 *Inst.* 479, 436, 790. *Cro. Car.* 25.

Denton. The solemn league and covenant arose from a treaty between the parliament and the *Scots*, as appears by *Rushworth* and *Clarendon*, and all the histories of those times. This league was calculated for the extirpation of all episcopal government, by that means to overthrow the church; and can it then be imagined, that less care should be requisite to keep persons of that pernicious principle from intermeddling in church affairs, than from spreading the contagion in corporations?

But admitting the declaration was not temporary; yet though not expressly, it is implicitly repealed. The act requires the oaths and declaration to be taken together, and therefore the 1 *W. & M.* has not severed, but repealed them all. Some argument to evince this may be drawn from 2 *W. & M. c. 8.* for reversing the judgment in the *quo warranto* against the city of *London*, and from the 11 & 12 *W. 3. c. 17.* and especially from 1 *Geo. c. 13. §. 23.* in which the proviso will be of no force if such a latent defect as this can be trumped up. *Argumentum ab inconvenienti*, if it holds in any case, holds in this. In the case of *Bewdley* the *venire* was *de vicineto*, when it ought to have been *de corpore com'*, but because this had been the practice in all *scire facias*'s, that practice prevailed against the express words of the act of parliament. In *Bernardi*'s case the court suspended their judgment, till they saw whether the parliament would think it proper to continue him and the others in prison.

The objection arises from the words *for ever hereafter*. To which I answer, that inasmuch as the design was but temporary, those words can only extend to a temporary obligation. On the statute of 5 *Eliz.* the precedents used to be, that the party did not use the trade at the time of making the statute; but on account of the length of time that is now disused.

Reeve. At the restoration three things were to be provided for; corporations, the militia, and the church. The militia are out of this question: the church *quoad hoc* seemed to be most concerned; and no reason can be given why there should be a more lasting provision for corporations, than for the church. The statute of *circumspecte agatis* extends to all bishops, though the bishop of *Norwich* only is mentioned. The statute 1 *Geo.* designed to instance in all the qualifications, and the omitting this is an argument, the law-makers esteemed it none, for the affirmative there implies a negative.

Mallett. The solemn league and covenant was an association, and no law. Necessity has superseded the express words of a statute; as where the statute of *Marleberge* prohibits the driving distresses out of
of

of the county, yet where the lord's manor is in another county, it has been held lawful. In the case of *The King v. Jeffries* about a year since, such a rule as this was discharged, because the attorney general had no hand in praying it.

Whitaker Serjeant contra. Every subject has a right to inform the court, whenever any other is guilty of a breach of the law. An information lies for not repairing a bridge, and yet there is no private injury. The statute doth not require us to name a relator, till the information is actually granted. I agree the court has a discretionary power, either to grant or deny what we now ask for.

It is a new doctrine which is now advanced, that if an act of Parliament be disregarded for a time, it ceases to be binding. But if it should, yet there is not that argument in this case. Daily experience tells us, that the sacrament is taken as that statute requires; and it is coupled with the declaration, and must stand and fall with it. The question is not whether there are any persons now alive who took the solemn league and covenant, but whether or no there remains any obligation at this day on members of corporations to make the declaration against it. My lord *Clarendon* was of opinion that the obligation was perpetual, as may be gathered from his own words, *To the end that we and our posterity*. But not to rest this matter upon the single testimony of any historian, here is *testimonium rei*, the very words of the act of parliament, which enacts, *That this declaration shall be made for ever hereafter*, and in default thereof the election to be void.

Whether the distemper be general or not, the court cannot take notice upon this motion: The only question is, whether the defendant has complied with the terms of this act of parliament, which we insist is in full force.

Marsh. We need not pray this information through Mr. Attorney, for the statute gives it to any person with leave of the court. And though *Jeffries's* case seems to thwart us, yet the constant practice is more than an answer to the authority of that case. As to the affidavit, we think it sufficient. We shew the defendant did not make the declaration when he took the oaths of office, which was the proper time; and this is enough to put him to shew, he took it at any other time and place. And since he has not laid hold of this opportunity, it may be concluded he has not taken it at all. That a tender was not necessary, was resolved in *Slatford's* case.

It

It has been said, that the reason of this provision was but temporary. In answer to which pretence I shall look a little into it, in order to shew, that as the obligation is perpetual, so is the reason of it. In 1643. the Parliament forces having had but ill success, they made application to the *Scots* for their assistance. Commissioners were appointed on both sides, and the result of their meeting was an association, which went under the name of the solemn league and covenant. The King immediately published his proclamation against it, as appears in 3 *Rush.* 488. The drift of this association was, to ruin the religion of our country; and to express the detestation of such abominable practices, the declaration was framed soon after the Restoration. And it had two views, one to disengage people from that obligation which they were in a manner forced into, and the other to fix a lasting and indelible brand of infamy upon those proceedings, in order to deter others from the like attempts. And now can any one say, the reason is but temporary? On the contrary, does it not manifestly appear to extend itself to all future ages?

As to the militia, there was no occasion for this provision: The crown had them in their power, but not so of the corporations. In 1 *Inst.* 81. b. it is said, an act of Parliament cannot be antiquated, or lose its force, for want of being put in execution. And *Hob.* 111. Sir *John Pilkington's* case there cited, *Fortescue* C. J. said they would be well advised, before they would annul an act of Parliament. It is an absurdity to say, that because the subject has lived some time in the breach of any law, that the obligation to observe that law ceases. In *Henry* the 8th's time all the clergy were brought under a *praemunire*, for suing bulls from the court of *Rome*; and bishop *Burnet* in his *History of the Reformation*, speaking of this matter, tells us, That though it had been practiced for a long time, to sue such bulls, yet the old laws prohibiting thereof were in no degree impeached by such usage.

Yorke. It is sufficient that we lay a probable cause before the court, when we pray this information. We were not obliged to travel the country, to inquire of every justice of the peace, whether the defendant had made any declaration before him. Nor does this cause come within the reason of returns, which were not traversable at common law, and therefore ought to be certain to every intent. The statute 9 *Ann.* is general, and not confined to prosecutions by competitors only. I was of counsel in *Jeffries's* case, and the reason why that information was refused was, because he proved he took the oaths about a fortnight after the proper time, and not because the prosecutor came without Mr. Attorney to back him.

him. In the case of *Denny v. Norris*, the question was not about the tender, but whether that matter was assignable for error. *Hale* in his *History of Law* 4, 5, 6. where he treats of old laws whereof no written monument is left, does not conclude them of no force; but only says they are grafted into the common law. In the case of *Thornby v. Fleetwood*, Serjeant *Cheshyre*, who argued in *C. B.* against the statute of 1 Jac. 1. c. 4. was pleased to use this metaphor, that it was a still born statute, because says he it has not cried out till now: But that was not thought a reason to set it aside.

There is no more absurdity for people to take the declaration now than there was formerly, as to all persons who had not taken the covenant. But granting there may be some seeming absurdity, is it therefore to be disregarded? It may be a reason to have it repealed, but till then it binds. Suppose a statute requires, that whoever enjoys an office shall declare that two and two make four: I know of no power which could reject this as frivolous. The clause in the act of uniformity shews, that it would not have expired in 1682. without that provision, and there was no reason to continue it longer as to the clergy, for they take the oath of canonical obedience. It was said causes have been thought too big for this court: I grant it, and take this to be one of them; it is too big for this court to repeal and set aside acts of Parliament.

Reeve. 2 Inst. 28. usage prevailed against a branch of *magna charta*.

The *C. J. Powys* and *Fortescue* Justices, held the affidavit sufficient, and that any private person might apply for the information. But *Eyre J.* was *contra* as to both. And as to the principal point, it was referred to the consideration of all the Judges. But before they gave any opinion the act was past for the establishing of corporations. 5 Geo. 1. c. 6.

Dominus Rex *vers.* Smith.

Rule on justice to produce examination.

A Rule was moved for upon a justice of peace to produce an examination at a trial; and the court doubting, it was adjourned. And afterwards the *C. J.* delivered their opinion. Where things are evidence of themselves, as corporation books, we make no rule to produce them, but only that the party may have copies, which copies are evidence: But this examination is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits, and therefore a copy of them is no evidence; and we must have the original, for nothing else concludes the party.

Make

Make the rule, that the justice *produci faciat* (not *quod producat*) the examination at the trial, and give the party a copy in the mean time.

Ogburn *vers.* Berrington.

ERROR *e C. B.* Infancy assigned. *Doubt del court*, and Practice. feigned issue. Found with the plaintiff in error, and judgment reversed upon return of the *postea* upon motion without argument in the paper. But within a day or two after between

Cunningham *vers.* Houlton.

ON error, want of an original and warrants of attorney were assigned. The defendant pleads a release of errors, and upon *non est factum* replied, the plaintiff was nonsuit. Thereupon I moved to affirm the judgment, but the court bid us put it in the paper; and when it came on, they objected against affirming the judgment, because the pleading the release was a confession of the errors, and so it would be to affirm an erroneous judgment. And besides, the tables were now turned; the question not being whether error or not, but whether barred or not by the release. I quoted *Aston's Entries* 339. where the entry is *quod judicium affirmetur*. But notwithstanding this, the court gave the judgment *quod querens nil capiat per breve de errore*, which I had before told my client was the proper way.

What judgment shall be given where a release of errors is found.

Show. 50.

Dominus Rex *vers.* Beck.

HELD that there must be a formal conviction upon the statute of hawkers and pedlars, though it mentions nothing of it; and that a *certiorari* lies to bring it up hither.

Hawkers and pedlars. 8 & 9 W. 3. c. 25.

Ramsden *vers.* Ambrose.

At Guildhall, November 21, 1718. coram Pratt C. J.

THE husband and wife lived separate. She boarded in the plaintiff's house, who declares against the husband for meat and drink for him found and provided. On the evidence it appeared to be for the wife. And the C. J. held, it did not support the declaration; for though the husband is chargeable upon his implied contract for what necessities are administered to the wife; and therefore

Where husband and wife live separate, cannot declare for her board as for meat and drink for him found and provided.

fore if goods are delivered to her, the vendor may declare generally for goods sold and delivered: Yet in this case the plaintiff fails in his description of the subject matter of the contract. So that where he now declares generally, a recovery in this action could not be pleaded to a special action for meat and drink found and provided for the wife.

Amies vers. Stevens. Ibidem eodem die.

Carrier not answerable for goods lost by tempest.

THE plaintiff puts goods on board the defendant's hoy, who was a common carrier. Coming through bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted, that the defendant should be liable, it being his carelessness in going through at such a time; and offered some evidence, that if the hoy had been in good order, it would not have sunk with the stroke it received, and from thence inferred the defendant answerable for all accidents, which would not have happened to the goods in case they had been put into a better hoy. But the C. J. held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had intirely differed the case: And no carrier is obliged to have a new carriage for every journey: It is sufficient if he provides one which without any extraordinary accident (such as this was) will probably perform the journey.

Bushe vers. Miller. Ibidem eodem die.

That which makes a man a trespasser may not amount to a conversion.

UPON the *Custom-house Key* there is a hut, where particular porters put in small parcels of goods, if the ship is not ready to receive them when they are brought upon the *Key*. The porters, who have a right in this hut, have each particular boxes or cupboards, and as such the defendant had one. The plaintiff being one of the porters puts in goods belonging to *A.* and lays them so that the defendant could not get to his chest without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are lost. The plaintiff satisfies *A.* of the value of the goods, and brings trover against the defendant. And upon the trial two points were ruled by the C. J.

1. That the plaintiff having made satisfaction to *A.* for the goods, had thereby acquired a sufficient property in them to maintain trover.

2

2. That

2. That here was no conversion in the defendant. The plaintiff by laying his goods where they obstructed the defendant from going to his chest, was in that respect a wrong doer. The defendant had a right to remove the goods, so that thus far he was in no fault. Then as to the not returning the goods to the place where he found them; if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.

Fotheringham vers. Greenwood.

At Guildhall, 27 November 1718, coram Pratt, C. J.

A. Having money of the plaintiff's in his hands, loses it at play. The plaintiff brings an action after the three months upon the statute of gaming 9 *Ann. c. 14.* and produces *A.* as a witness. Upon a *voire dire* he confessed, that if the plaintiff recovered he was not to be answerable; but if he failed, then the money was to be deducted out of his fortune in the plaintiff's hands. *Et per C. J.* Though the recovery against the defendant will not sink the demand for the money imbezilled by *A.* yet his apprehension, that the plaintiff will not trouble him for it, is a bias upon him; for if a witness thinks himself interested in the question, though in strictness of law he is not, yet he ought not to be sworn. And *Darnall* Serjeant mentioned the case of *Mr. Chapman of Bucks*, who owned himself to be under an honorary though not under a binding engagement, to pay the costs; and *Parker C. J.* on solemn debate rejected him, and so it was done in this case.

He that apprehends himself interested, though *stricto jure* he is not, is no witness. *Salk. 283.*

Marks vers. Marks. In Canc.

Abr. Eq. Caf. 106.

WILLIAM Marks having a wife and five sons, *Theodore, William, Ezekiel, Daniel* and *Nathaniel*, and being seised in fee of Lands in *Northamptonshire*, and of the premises in question, 10 April 1680 conveyed the *Northamptonshire* estate to trustees, in trust to sell the same, and dispose of the money according to the directions of his will, provided if *Theodore*, his heirs or assigns, should within one month after his decease pay 500 *l.* as he should direct by his will, then the trust should determine, and the lands remain to *Theodore* in fee. Afterwards he makes his will, and reciting the trust, disposes of the 500 *l.* to *William* and *Ezekiel* his

Devise to *A.* for life, remainder to *B.* in fee, provided that if *C.* within three months after *A.*'s death pays *B.* 500 *l.* then *C.* to have the land in fee. *C.* dies living *A.* *A.* dies. The heir of

C. (though not named) may tender. But if the law were otherwise, equity could not relieve by construing the remainder to *B.* only as a security for the payment of money.

sons, and then devises the lands in question to *Anne* his wife for life, remainder to *Daniel* and his heirs; "provided that if my son "*Nathaniel* do and shall within three months after the decease of "*my wife* pay or cause to be paid to *Daniel*, his executors or "*administrators*, the sum of 500 *l.* then I give the land to *Nathaniel* and his heirs for ever." The devisor dies, the wife enters, and joins with *Daniel* in incumbrances. *Nathaniel* dies leaving the plaintiff his son and heir. The wife dies. And because of the incumbrances the plaintiff, instead of tending to *Daniel*, brings his bill in this court, to know where to pay the money.

2 Cro. 592. Sir *Thomas Powys pro quer'*. The question is, Whether the heir of *Nathaniel* can make the tender? I hold he may. In queen *Elizabeth's* time executory devises came in. *Fulmerston's* case is the first, and they were allowed to extend as far as one life. Afterwards the house of lords in the case of *Lloyd v. Cary*, *Parliament Cases* 137, allowed a reasonable time after the life, viz. a year: We are within that time, for we come in three months. The objection is, That the tender is personal in *Nathaniel*, it not being said, that he or his heir shall tender. To this I answer, That there is no laches in *Nathaniel*; it was not to be done in his life, but after the mother's death; and the heir having an interest, is within the reason of *Litt.* §. 334. Formerly it was thought, a fee could not be limited upon a fee, but it is otherwise since *Pell* and *Brown's* case where the first fee is conditional. Though the estate itself never vested in the ancestor, yet an interest did; and therefore on performance of the condition the heir is in by descent, according to the third point in *Shelley's* case and the case of *Wood* there cited, and *Chapman's* case, *Plowd.* 284. Thus far in a court of law: But in a court of equity, this shall be taken as an immediate devise to *Nathaniel*, subject to the payment of 500 *l.* to *Daniel*, who has the former limitation only as a security, according to 1 *Chan. Cas.* 89.

Cheshyre Serjeant of the same side quoted *Litt.* §. 334. illustrated by §. 337. 1 *Roll. Abr.* 420. *Winch* 103, 105, 115. *C. J. Jones* 390. And a case in *C. B.* debated *Mich. 2 W. & M.* and entered *Trin. 4 Jac. 2. rot.* 751 or 707. *R. H.* seised in fee made a feoffment to the use of himself for life, remainder to his wife for life, remainder to *Mary* in tail, remainder to *Sarah* in tail, remainder to his own right heirs; provided, that if *Mary* does not pay *Sarah* so much within such a time after his wife's death, then *Sarah* shall have it in tail, remainder to *Mary* in tail. *R. H.* died, *Mary* died, and then the mother died; and it was adjudged, that *Mary's* heir might pay the money, for the heir had an interest vested, though the ancestor died living the tenant for life.

Sir Robert Raymond, *ad idem*. The objection is, that *heirs* is a word of limitation, whereas the plaintiff if he takes now must take as a purchaser. Answer: He takes by descent. A possibility or remainder on contingency may descend. *Bro. Feoffment to Uses* 59. 3 Co. 20. *Poll.* 55. *Co. Litt.* 219. b. Daniel has no prejudice, whether the 500 l. be paid by Nathaniel or his heir. The possibility is coupled with an interest. *Yelv.* 85. 7. So Sir Francis Englefield's case; and we are in the case of a will, where the intent is to be pursued. 1 *Saund.* 150.

Hooper Serjeant *contra*. This is not an executory devise, which can take effect before any act done: The ancestor was to do an act, he dies without doing it; and as he could not take till he did the act, so the heir cannot now that it is impossible to be done in the manner the devisor directs.

Mead. There is a great difference, where the heir comes to perform a condition that is to put him into his ancestor's estate, and where he is to gain a new estate. It is admitted the plaintiff cannot take as a purchaser, and if so, then to make him take by descent, you must give something to the ancestor. Here he has nothing; he has no right to the land, but a bare *scintilla juris*, a right to do something, which will give him a title after it is done. And he had an election whether he would do it or not. It is considerable, that Nathaniel only is named to tender; but to Daniel are added *executors and administrators*. If Nathaniel had survived the wife, and lapsed the time; no body can say, the least right would have descended to the heir. This is a condition precedent, which ought to have been performed, and against this Chancery cannot relieve, as they can in the case of a condition subsequent; as was settled in the case of *Bertle v. Falkland*, *Salk.* 231. *Select Cases* 129.

Adjournatur. And afterwards the Lord Chancellor and the Master of the Rolls delivered their opinions *seriatim*.

Sir Joseph Jekyll, Master of the Rolls. The equity which brings this matter into the court is, that the defendant Daniel had so conveyed and incumbered this estate, that it became difficult for the plaintiff to know to whom to pay the money. Now before this can be settled, the court must first determine a question in law, whether the heir of Nathaniel upon tender or payment of the money may enter. And I am of opinion, that this is not personal to Nathaniel, but goes to his heir. If this was a condition at common law, there is no doubt but the heir might perform it and enter, *Litt.* §. 334. and in the case of a condition for payment of money at a certain time by the
feoffee

feoffee, who before the day enfeoffs another, the second feoffee may pay the money. *Litt.* §. 336.

But I admit the present case is not a condition, but an executory devise. But wherein does the difference consist? All that it can amount to is only this. In the case of a condition the heir has a right antecedent to the condition to enter, for he does not gain a new estate, but invests himself in the old one; whereas in our case he is to gain a perfectly new estate, which the ancestor never had. In answer to this it is to be considered, that there is a condition to create an estate, which the law will construe liberally. *1 Inst.* 219. *b.* it is said a condition that is to create an estate, is to be performed as near the intent and meaning as can be, if the words and letter cannot be strictly pursued. From whence I observe, that there may be a performance which is not within the letter. But besides, this is the case of a will, in construction of which the law allows a great latitude to come at the meaning of the deviser. Now in our case his meaning seems to be this, upon a view of the whole will. He is distributing his estate amongst his children; to some, money, to others, land. In the proviso for *Theodore's* payment of 500 *l.* recited in the will, it is worded, *if Theodore, his heirs or assigns, shall pay*: Now no one can imagine, that by the difference of words in that proviso, and this in question, the testator's intention was different. In both cases he seems to be aiming at a method of charging those several lands with 500 *l.* a-piece.

Let us now consider whether by this will *Nathaniel* himself had any thing in the lands in question. I conceive he had a future interest or possibility, which might descend to the heir, though that right never vested in the ancestor. That such a future interest in a term will go to the executor or administrator is known law. *Walden's* case in *Plowd.* 519. is full to that point. It may also be released, as in *Lampet's* case, 10 *Co.* 48. *b.* Now why such a future possibility should in a term go to the executor or administrator, and in a freehold not go to the heir, who is as much the representative of the ancestor as the other is of the testator, I cannot imagine. At common law such a possibility arising by act executed would come to the heir; as before the *stat. de donis*, the reversion upon a fee-simple conditional was only a possibility, and yet it went to the heir. And even a possibility may go to the heir, which never could vest in the ancestor, as *1 Inst.* 378. *b.* So the same possibility will go to the heir, where the limitation is by way of use. *1 Co.* 98. *Shelley's* case, and *Wood's* case there cited, are very strong. And though it is there said, that a future interest or possibility cannot be released, yet that was before *Lampet's* case, where it is determined that such a possibility may be released; and I believe it would be so now. The
case

case of *Spring v. Sir Julius Cæsar*, 1 Roll. Abr. 420. Winch 103. was thus: A fine by A. and B. to the use of A. in fee, if B. does not pay 10 l. at Michaelmas after, and if he does then pay it, it shall be to the use of A. for life, remainder to B. in fee: B. dies before Michaelmas, and Rolle says, it seems the heir of B. may pay the money, for this is not more personal, being the payment of money, than in the case of *Litt. §. 334.* upon a mortgage: And though in the report of this case in C. J. *Jones* 390. it is said, the court were divided: Yet *Croke* and *Jones* were of opinion, the performance of the condition was not personal; and they said, they did not see the difference between that case and the case of *Littleton*; and since that reason was not contradicted by any of the other Judges, and reported by *Rolle* as law, I must take it for law.

Now since these several possibilities are judged to go to the heir; I do not see why such possibility created by will, since executory devises are allowed, should not go to the heir also. The case of *Brett v. Rigden* cited for the defendant is nothing to the purpose, for there was in effect no devise to the ancestor, he dying in the life of the devisor; but in the present case here is a compleat devise, and such as the ancestor might have taken.

It was insisted for the defendant, that the plaintiff's father had an election, to pay or not to pay the money; and therefore it is personal in him. I admit it; but then such election is always given in favour of him that is to pay, the receiver having no election at all; and in *Littleton's* case the mortgagor has equally an election, and yet it is not personal in him. My Lord *Coke* in his comment upon that section gives four reasons for *Littleton's* opinion, which all concur in the present case. 1. A day appointed; 2. If the heir in our case takes by this executory devise, (as has been shewn he does) in nature and course of a descent, it is the same thing as where in *Coke's* second reason the condition descends to the heir. The two remaining ones are plainly the same in our case, and so *Littleton* is indeed a full authority in point.

It is not to be made a question, whether this future interest or possibility, being to arise beyond a life, is good by way of executory devise, since the case of *Lloyd v. Cary*, which allows a year after. Upon the whole I am of opinion with the plaintiff, as to the point of law.

It was insisted upon further for the plaintiff, that if the law were against him, yet in equity he would have a good title upon payment of the 500 l. the estate in *Daniel* being to be looked upon as a security only. And for this 1 *Chan. Ca.* 89. was cited. But now

lest any one should go away with this dangerous opinion, that another construction ought to be made in a court of equity, than would be in a court of law; it is to be observed, that that case was of a trust, and unless it was construed as a trust for the younger children, Sir *Thomas* would have run away with the whole estate.

Parker Lord Chancellor. I am of the same opinion with the Master of the Rolls. And if we look on this case on every side, it appears the right is clearly for the plaintiff. The will shews the intention, though the word *heirs* be left out in the case of *Nathaniel*, yet he should be in the same condition with *Theodore*. The question is indeed a question of law, and the method I have taken to satisfy my self has been by considering this proviso; 1. As upon a feoffment; 2. As upon a will; and 3. As it would stand in equity, as a provision for payment of money.

1. At common law; if *William Marks* had made a feoffment to *B.* for life, remainder to *Daniel* in fee, with this proviso; *Nathaniel* could take no benefit of this condition, because contrary to a maxim in law, that a condition cannot limit over an estate to another, but can only be taken advantage of by the maker. But in case of a feoffment by *A.* to *B.* and his heirs, upon condition that if *A.* pays 500 *l.* to *B.* within three months, then *A.* shall have his estate back again; if *A.* dies before the three months are expired, his heir, though not mentioned, may pay the money and enter. *Litt.* §. 334.

2. Consider it upon the statute of wills, and it is the same upon the statute of uses, since executory devises and springing uses have been allowed of. At first they began when merely future, and sprang out of the estate of the devisor. Afterwards they were extended beyond a life; as if an estate was devised to *A.* for life, remainder to *B.* in fee, upon condition that if *C.* pay a sum of money to *B.* within a certain time after *A.*'s death, then *C.* to have a fee. This has been allowed of, and it is no more than granting the advantage of a condition to another person, which by common law conveyance could go only to the maker himself. Now this advantage is in its own nature descendible; because it is nothing but that very right, which if it had gone to the devisor himself, would have descended to his heirs. Take this as a possibility or future interest, and the cases mentioned by the Master of the Rolls shew plainly, that this is a right descendible to the proper representative, whether of a term or an inheritance, the former to the executor or administrator, and the latter to the heir. But if we consider it (as I have done) as a condition, the case is yet stronger; because this benefit of a condition is what is taken notice of before by the common

mon law to be descendible; and since by the statute of wills and uses the benefit of a condition is allowed to go over to a stranger, that stranger ought to have it as fully and compleatly as the feoffor himself would have at common law: That is, it shall go equally to the heirs of the one as of the other.

3. Consider the matter as it stands in a court of equity. I agree intirely, were the law against the plaintiff, that he could not pay the money at the day; this court could not have intermeddled: But if the law be with him, it will be another consideration, whether if he slipped the time of payment, he should not be relieved. This is the case of a mortgage; equity looks upon the mortgagee's estate, which is become absolute by passing the day, as only a security for the money, and will therefore defeat it upon payment after the day. Now in our case *Daniel's* interest is merely personal; by the will the money is to be paid to him or his executors, and the estate of inheritance is given to *Nathaniel* and his heirs, subject only to this incumbrance. And though this court has not relieved against an heir at law upon a condition precedent to raise estates out of the heir's estate; yet when it is to be raised only out of the estate of the devisee, it may very well do it. *Nathaniel* therefore would have the equity of redemption, the estate of *Daniel* being only as a security. If this therefore had been the case, I think this court would have relieved. But the present case does not want that assistance.

To return then to the question in law, whether the death of *Nathaniel* has destroyed the benefit of the condition as to his heir: And this contains two questions; 1. Whether this condition be such as may be performed after *Nathaniel's* death; and 2. Whether the estate must not first vest in the ancestor, before the heir can take. As to the first, I think it not personal in *Nathaniel*, but performable by his heir. The payment of 10 l. or such small sum, that bears no proportion to the estate, may perhaps be considered only as a ceremony, to declare the intention of the party; and therefore if in the case of *Spring v. Sir Julius Cæsar*, the two Judges continued in their opinion, it must be as I conceive because the sum was so small, that they looked upon it as a meer ceremony. But where the sum is 500 l. it must be looked on as a certain valuable consideration; and since *Englefield's* case in 2 Co. the payment of money is a thing of all things the least personal, it not being material who pays it, so it is but paid. If therefore the plaintiff pays the money, all the purposes of the will are answered, as fully as if *Nathaniel* himself had paid it. And this exactly answers to *Littleton*, and the reasons given by *Coke*, which are not adapted to the institution of the common law only, but to the reason of the thing. As to the second, *Wood's* case in 1 Co. 99. a. proves
evidently,

evidently, that an heir may take by descent by virtue only of a possibility of right which was in the ancestor.

It has been objected, that this is a condition precedent: But I take it to be a condition subsequent: It would indeed have been precedent, if it had been to raise an estate out of the heir's estate; but this is only to defeat *Daniel's* estate, and then *Nathaniel* comes into the place of the heir at law. But this is a meer verbal dispute: No matter whether precedent or subsequent, if the performance by the heir be to be looked upon as the performance of *Nathaniel*, it shall have the same effect as if *Nathaniel* himself had paid the money. I think therefore the plaintiff would have a good title at law on payment at the day. But yet he came very properly into this court, because of the hazard he run in paying the 500 *l.* to *Daniel*. There must be a decree in nature of redemption, that is, that the plaintiff pay the principal, and interest from the day of payment, and have the estate conveyed to him. The money must be brought before the Master, who must see what demands are upon it, and adjust the proportions of the several claimants.

Philips *vers.* Smith.

Trin. 2 Geo. B. R. rot. 460.

Amendment.

Lill. Ent. 254.

IN debt upon 7 & 8 W. 3. c. 25. against the officer who presided at the election of members of Parliament, for refusing to deliver a copy of the poll: After judgment for the plaintiff in B. R. and error brought in the Exchequer Chamber, the plaintiff moved to amend in several particulars, which he was ordered to give a note of to the other side. And now they came to shew cause against their being amended.

The first amendment desired was in the warrant of attorney, where the defendant was styled bailiff *bugi* for *burgi*.

Cheesbyre. There is nothing to amend this by, as there was in the case of *Cooke* and *Duchess of Hamilton*, where they produced the common rule in ejectment, and that was the foundation for putting in the attorney's name.

2. To put the word *vic.* into the *distringas*. It is *Rex fidei defensor, &c. Somerset salutem*, omitting *vic.* There is likewise nothing to amend this by; no award of it upon the roll, as there is of the *venire facias*. And *non constat*, but it might be designed to be directed to the coroner.

3. They would amend the *teste* of the *venire*, which in other words is to solve a discontinuance. The award is *quinden' Martini*, and they have taken it out *teste* the first day of *Hilary* term, and now they would *teste* it in *Michaelmas* term.

4. The other amendment they would make is, to add continuances. Of them they have no need, having a verdict, which cures the want of them.

Reeve. This is a proceeding upon a penal law, and therefore the court will be stricter than in common actions. And as the statutes of jeofails will not help them, they must shew it to be amendable at common law. In the case of the *Queen* and *Tuchin*, which was an information for a libel, where the *distringas* was *teste* the day after the return of the *venire*, the court on great debate refused an amendment. Salk. 51.

Wearg. The question is, whether this be a penal popular statute within the exception of the statutes of jeofails. I agree, where a man is intitled to an action at common law, and an act of Parliament comes and gives him an increase of damages; that is not to be taken as a penal statute. 9 Co. 71. 3 Bulst. 378. But this is not that case. Any person who demands the poll may have the action if he be refused it, and that shews it to be a popular statute.

All amendments are either at common law or by statute. Nothing was amendable at common law, but the same term. 8 Co. *Blackmore's case*. Salk. 50. By 14 E. 3. c. 6. and 8 H. 6. c. 12. such faults only are amendable, as proceed from mistake, not ignorance; if the *teste* of a writ be after the return of it, that is a plain mistake, and amendable; but when a man designedly makes it *teste* of one term, when it ought to be of another; that is matter of judgment. Show. 80. The direction of a writ is a more essential part than the *teste* of it, or the return. It cannot be a writ unless it be directed to some body, but it may be good without a return, as where it is *vicontiel*. Where there were two sheriffs, and the writ was directed *vicecomiti*; there indeed it was made *vicecomitibus*, because there was a direction, though an improper one. 2 Cro. 188. Yelv. 110.

Yorke. At common law nothing was amendable, but the act of the court. If *vic.* is to be put in now, it will be giving an authority after the execution of it. In the case of *Sloper v. Child* in Cro. Jac. the word *vic.* was put in, but that was because the award of the *venire* warranted it, which the award here does not, for it is of

a subsequent term, and at a time when the defendant had no day in court. In *Cro. Eliz* 820. the return of the *venire* was held amendable, but not the *teste*, because that is never mentioned in the awarding it upon the roll.

Hutt. 56.

Comyns Serjeant contra. The statutes of amendments do not except popular actions, as the statutes of jeofails do. 3 *Lev.* 375. In a *qui tam*, &c. on the statute 31 *Eliz.* for 5 l. for selling a horse in *Smithfield* not tolled, there was an amendment. So *Salk.* 324. 1 *Roll. Abr.* 205. pl. 3. *Cro. Car.* 275, 278. *Jones* 302. 1 *Roll. Abr.* 202. pl. 7. 1 *Brownl.* 156. upon the statute of hue and cry the day of committing the robbery was amended. It appears the writ was intended to be directed to the sheriff, for there is in it *com' tuo*, and therefore we may put in *vic.* according to *Yelv.* 69. *Cro. Jac. Sloper v. Child.* So the *teste* of writs have been amended. 2 *Cro.* 442. *Yelv.* 64. *Cro. Car.* 38. 2 *Cro.* 64. 2 *Brownl.* 102. *Moor* 599. *Cro. El.* 183. *Moor* 684. *Cro. El.* 203. 2 *Cro.* 162. *Moor* 465. *Cro. El.* 467. *Noy* 57. 2 *Jones* 41. And we may add the continuances according to 1 *Roll. Abr.* 200, 205, 206. pl. 6.

Pengelly Serjeant. The crown has no part of this penalty, but the party grieved has it all, and he has an antecedent right before bringing the action, which a common informer has not. He shall have costs. 1 *Roll. Abr.* 516. pl. 5. *Sir W. Jones* 447. 1 *Ven.* 133. *Cro. Car.* 539. As to the warrant of attorney, we needed not put in any addition. The other is right, and that is something to amend by. Then as to the *vic'*, this writ is returned by the sheriff; so no colour to say it might be intended to go to the coroner. In *C. B.* the last term, between *Child* and *Sloper*, the *venire* was to the sheriff of *Warwickshire*, and the *habeas corpora* to the sheriff of *Nottingham*, and this was amended. 3 *Mod.* 78. So *Pasc.* 8 *W.* 3. *B. R. Wright v. Inhabitantes de Penhurst*, the *venire* was amended from *de placito butefii et clamoris*, to *de placito transgr' et contempt'*, *contra statut' de Hue et cry.* As to the *teste*, vide *Hardress* 321. 1 *Roll. Abr.* 201. pl. 36. *Cro. El.* 572. And the continuances being only matter of form, may be entred at any time. 1 *Roll. Abr.* 205. 2 *Cro.* 211.

The court doubted as to the continuances, but held all the rest amendable. And *Eyre J.* quoted *Kite v. Episcopum Worcester*, *Pas.* 7 *W.* 3. where one of the defendant's names was omitted in the *distringas*, and it was amended after trial. *Adjournatur.* And afterwards when it came on again, the court declared for all the amendments, except the want of continuances, which they had debated again. And for the amendment the former arguments were insisted

on; and 1 *Roll. Abr.* 200. *pl.* 27. *Yelv.* 156. 26 *H. 6. amendment* 33. were cited. In answer to which it was insisted, that continuances were the act of the court, and the statute 8 *H. 6.* extends only to misprisions of the clerk. 8 *Co.* 156. *b.* *Stiles* 339. 3 *Lev.* 431. And towards the end of the term the Chief Justice delivered the opinion of the court, that the continuances might be entered at any time, as well after as before the judgment; and a distinction was taken between ministerial and judicial acts, the first of which were at common law amendable at any time, but the latter not after the same term. And as to amendments of judicial acts, a difference was made between amendments which deface and alter the record, and such as are only additional to it, in order to eke it out and compleat it.

Gould vers. Coulthurst.

THE writ of error was *teste* in *Hilary* term, of which the judgment was. But the plaintiff below enters continuances upon it till *Trinity* term, which occasioned the writ of error to be quashed. And now the question was as to costs. And all the court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occasioned by the act of the defendant in error, which the plaintiff could neither foresee nor prevent; it was not a case within the 4 & 5 *Ann. c.* 16. which gives costs against the plaintiff in error upon quashing defective writs of error. Then another question arose, whether the plaintiff in error should not have his costs in this case, being defeated of the benefit of this writ of error by the artifice of the defendant in error. And as to this point the C. J. and *Eyre J.* were against giving costs, and *Powys* and *Fortescue* Justices, were of the contrary opinion: So the court being divided, the writ was quashed without costs of either side.

Writ of error
quashed with-
out costs.

Dominus Rex vers. Turner & al'.

THE defendants having been indicted for a riot in entering into a room, they came in and confessed the indictment, and moved to submit to a small fine. The prosecutor, to aggravate the fine, produced affidavits, that a young gentleman, who was then in the room and ill of the small pox, was so frightened, that he died; though he was in a very good way before. And whether these affidavits could be read upon this indictment, was the question.

What conse-
quences shall
be considered
in aggravation
of a fine.

Eyre J. was against the reading of them, because it was an injury to a third person, and no mention of it in the indictment. If
in

in trespass the plaintiff would give beating his servants in aggravation of damages, it must be laid in the declaration. And he mentioned the case of *Rex v. North & al'*, 9 W. 3. in B. R. where in an indictment against several journeymen weavers for a riot, the circumstance of their meeting, in order to oblige their masters to raise their wages, was not allowed to be given in evidence, not being laid in the indictment.

But the C. J. and *Powys* and *Fortescue* Justices, were for reading the affidavits, because this was the immediate consequence of the riot, and could not subsist as a crime of itself. And if it was otherwise, every man must make his indictment as long as his evidence. Besides, why are affidavits ever read, unless it be to inform the court of circumstances, that cannot appear upon the general allegation of the crime? They said, the true distinction was, where the matter can or cannot subsist as a distinct crime by itself: The combination of the weavers was a conspiracy, which is a crime indictable; and it would have been hard to fine them upon that account, and yet leave them open to be indicted for a conspiracy. In an indictment for a riot in breaking windows, *Holt* C. J. let them in to shew, that it was because the prosecutor had put out illuminations for the peace of *Ryswick*. If circumstances are not to be considered, the punishment for a riot must be the same in all cases, which would be highly unreasonable. The affidavits were read.

Hilary

Hilary Term

5 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Nicholas Lechmere, *Esquire, Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

King qui tam *vers.* Bolton. Ante 117.

THE defendant having brought error in Parliament, the record was transcribed; and as it was carrying to the house of Lords, the original was picked out of the officer's pocket: The House of Lords received the transcript, without examining it. And now this court ordered a new entry to be made. They were attended in vacation at their chambers, but said they could not do it there. And afterwards the judgment of *B. R.* was affirmed in Parliament. And *Pasch. 9 Geo. B. R. Inter Needham et Grano*, the like leave was given, on a loss of the roll by the attorney.

Loss of record
supplied by a
new entry.
Lill. Ent.
523.

Chartres *vers.* Cusaick.

ERROR out of the King's Bench in *Ireland* of an affirmance of a judgment in *C. B.* there; and want of warrants of attorney on the writ of error in *B. R.* were assigned. And the court

Assignment of
errors set
aside.

set the assignment of errors aside; and said it had been done so several times, upon account of the delay which would follow upon awarding *Certiorari's*. And the case of *The King v. Episcopum Miden*. was mentioned for that purpose.

Anonymous.

Bringing money into court.

IN trover for money, the court gave leave to bring the whole money declared for into court. But said they could do it only in this case, and not in trover for goods.

Morgan *vers.* Williams.

Words actionable.

IN case for these words, *Thou art a thief. Of what? Of every thing.* After a verdict for the plaintiff, *Whitaker* moved in arrest of judgment, because the plaintiff could not be a thief of every thing, for stealing fruit off the trees is not felony. *Sed per Curiam:* It must be intended to be of every thing he can be a thief of. *Judicium pro quer'.*

Dominus Rex *vers.* Inhabitantes de Witham super Montem.

What a good adjudication.

PER Curiam: *It appearing to us, that he is likely to become chargeable,* is sufficient, without saying *to the parish from whence removed;* for it is not to give a jurisdiction, but only the reason of the judgment.

Dominus Rex *vers.* Leonard.

Commitment by rule of court not within the *habeas corpus* act.

THE defendant in the long vacation was committed by warrant from the Secretary of State for high treason. He lay by all *Michaelmas* term till the last day, and being then brought up, he was charged with an indictment, and recommitted by rule of court. The first week in this term he applied to enter his prayer upon the *habeas corpus* act; which the C. J. thought he might well do, for though he has lapsed the time upon the first commitment, yet that is now out of the case, and he stands upon the same terms with one originally committed since the last term. And though the statute has only the word *warrant*, yet he took commitments by rule of court to be within the meaning of it, this being an act for the liberty of the subject, and never intended to leave an indefinite power any where. *Sed Eyre et Fortescue Justices (Powys J. absente)* were of a contrary

contrary opinion, and said it had been otherwise resolved at the *Old Bailey*. Then the Chief Justice proposed to enter the prayer *de bene esse*, and consider the validity of it afterwards; as was done in *Bernardi's* case, who at the end of the term was refused to be bailed, notwithstanding his prayer was regularly entered; that entry being no estoppel to the court. But the others would not come into this, and so nothing was done. The counsel prayed that some *memorandum* might be made of this application, *sed non praevaluit*.

Dominus Rex *vers.* Gill.

PER Curiam: It has been so often resolved, that the sessions has an original jurisdiction, to discharge apprentices; that we will not suffer it now to be made a question, though it might be doubtful upon the statute itself. But in these orders it must be set forth, that the master appeared or was summoned, as was held *Pasch.* 10 *Annae, Regina v. Rutter*, and for want of this the order was quashed.

Sessions has an original jurisdiction to discharge apprentices. Salk. 67, 68, 491. 1 Vent. 174. 5 Eliz. c. 4. §. 35.

Between the Parishes of Coombe and Westwoodhay.

IN 1715 *Michaelmas-day* happened to be of a *thursday*. A man was hired upon the *saturday* following, to serve from *the said thursday after Michaelmas-day* to *Michaelmas* following. All this was stated for the opinion of the court. And the first question was, whether there was a compleat hiring for a year, for if the word *said* be rejected, then there wants a week, but if you keep it in and refer it to *Michaelmas-day*, then by rejecting the words *after Michaelmas-day* it will stand as a hiring from one *Michaelmas* to another. And *Eyre J.* thought it might well be so. *Sed caeteri contra*, for it would be to make it nonsense, in contracting to serve for a time past; whereas if the word *said* be rejected, the rest is natural enough. The other question was, whether (admitting the hiring to be compleat) there was any service for a year in pursuance of it as the statute requires, the contract being made upon the *saturday*. And *Eyre J.* said it might be intended he was those two days upon trial, and so the service would be sufficient. But the rest held, that such a service would signify nothing, for it is not in pursuance of any hiring; there must first be an hiring, and then a service, and not *vice versa* a service, and then a hiring.

There must be a compleat hiring and service for a year to gain a settlement.

Thatcher *vers.* Stephenfon.

Practice.

ERROR *coram vobis*, and infancy assigned: A *scire facias ad audiendum errores*, and a *scire feci* returned. The defendant did not appear and join in error, and the plaintiff applied to the court to know what to do; and they directed him to put it in the paper, without taking out any rule to join in error. And when it came on the judgment was reversed.

Morris *vers.* Nixon. In Canc.Fraudulent
remainder set
aside in equity.

ON a treaty of marriage the attorney for the lady told the intended husband, that his client desired a remainder might be limited to him. The husband consented; and when the settlement was read before execution, the lady objected to this remainder; whereupon the gentleman acquainted her, that it was done at her request, which she denied. But however, it being a remote remainder, and they unwilling to defer the matter, the writings were executed. And a bill was brought in this court, where the remainder was set aside as a fraud and imposition.

Dominus Rex *vers.* Cope et al'.*At Nifi prius in Middlesex, coram Pratt, C. J.*What is evi-
dence of a
conspiracy.

THE husband and wife and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's card-maker. The evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time were present, though it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy, for two men might do the same thing without having any previous communication with one another. But the Chief Justice ruled, that the defendants being all of a family, and concerned in making of cards; it would amount to evidence of a conspiracy, and directed the jury accordingly.

Titchburne *vers.* White.

At Guildhall, coram King, C. J. de C. B. 16 Febr. 1718.

PER King, C. J. If a box is delivered generally to a carrier, and he accepts it; he is answerable, though the party did not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable. *Allen* 93.

What acceptance makes the carrier liable.

Catten *vers.* Barwick.

At a Court of Delegates in Serjeants-inn in Fleetstreet,
27 February 1718.

BY the 89th canon churchwardens are to be chosen by the parson and parishioners jointly, and if they cannot agree, then one by the parson and the other by the parishioners. In the parish of *Bridge*— in *Yorkshire* the custom is, for the parson to appoint one, and the two old churchwardens the other, but it goes no farther. In this case the two churchwardens could not agree, so one presents *Barwick*, and the parishioners at large chuse *Catten*. It was insisted for *Barwick*, that his case was like that of coparceners, where if they disagree the ordinary may admit the presentee of which he will, except the eldest alone presents. On the other side it was said, that the cases widely differed, for in the case of a presentment the ordinary has a power to refuse, but he has not so in the case of churchwardens, for they are a corporation at common law, and more a temporal than a spiritual officer. And a case was cited to be adjudged in *B. R.* where to a *mandamus* to swear in a churchwarden the ordinary returned, that he was *servus minime idoneus*, &c. But a peremptory *mandamus* was granted, because the ordinary was not a judge in that case.

Where custom in chusing churchwardens cannot take place, they must resort to the canon.

The court held, that by this disagreement the custom was laid out of the case; and then they must resort to the canon, under which *Catten* being duly elected, they decreed for him. 60*l.* Costs.

Dominus Rex *vers.* Hare and Mann. In Canc.

Scire facias
returnable
ubicunque ge-
nerally is
good, with-
out limiting it
to England.

SCIRE *facias* out of the petty bag to repeal letters patents, returnable *coram nobis in Cancellaria nostra in octabis purificationis beatae Mariae virginis ubicunque tunc fuerit*. The defendants, *salvis*, &c. pray oyer of the writ, and then plead in abatement, that the writ ought to have been returnable *coram domino rege in Cancellaria sua ubicunque eadem Cancellaria tunc foret in Anglia*, and not generally *ubicunque tunc foret*. To this the Attorney General demurs.

Bootle pro rege. The objection which the defendants now make by their plea, strikes at all the forms of writs which have ever been in this court; for we shall shew that this is not only consonant to the *Register*, but is in the continued uniform course of the court.

We begin in the time of *Edward* the third, and shall shew instances in that reign, *Rich. 2. Hen. 4. Hen. 6. Q. Eliz. Car. 2. and Jac. 2.* and even down to the union, and ever since the union except in two or three instances, which we are not at a loss to account for. *Register* 150. The Prince's case, and the case of *Jefferson v. Morton*.

2 Saund. 27.

There was a case which gave heart and encouragement to this exception, *Hil. 9 Ann. in Chan. Regina v. Persebouse*: There the writ was *ubicunque tunc fuerit in Magna Britannia*, and it was abated by plea; and the reason was, because it differed from the *Register*, and was contrary to the act for the union of the two kingdoms.

The instances I hinted at before, that run counter to all the other precedents, were subsequent to that resolution; and from some expressions which were used in the arguing of that cause, it was thought proper *in majorem cautelam* to make some few writs returnable *ubicunque tunc fuerit in Anglia*. But surely what was done in a few instances out of abundant caution, can never be of force enough to overthrow that multitude of precedents, and of so great antiquity.

Yorke contra. This depends, 1. upon the reason of the thing; and 2. upon the precedents.

For I must agree, that though the reason of the thing be with us, yet if to determine this writ to be wrong would be to overthrow a multitude of judgments; then unless I could make some distinction

tion that could preserve those judgments, it would be difficult for us to prevail in this exception. But I take it there is no such danger.

Upon the reason of the thing, the nature of writs, and the common grounds upon which they have been settled, I must insist, that the return of this writ ought to have been, for the party to appear at the day before the King in his Chancery wheresoever it should be in *England*, and not generally *ubicunque tunc fuerit*.

There are several certainties which a writ ought to contain, with regard to the defendant, and in which he is concerned. 1. A command to a proper officer to warn the party to appear, either by summons or attachment. 2. The cause in which he is to appear. 3. The time when. And 4. The place where he is to appear. And if any of these fail, the writ will not be good.

1. As to the first: If the writ doth not contain that, it is a nullity; for it can answer no purpose, nor tend to any effect at all. And where the writ contains an improper direction in that particular, as where it has been a summons instead of an attachment, or an attachment instead of a summons, the books are full of cases of writs that have abated for that reason.

2. The cause in which he is demanded to appear must also be sufficiently described. If none be contained in it, then there is no charge against him in court, but he ought to be dismissed. And if it be not described with competent certainty, nay, in all formed writs, if it be not set forth in such and such precise words, as in case the particulars are ranged in an improper order only, that is error, and the writ shall abate for that cause.

3. The day upon which he is to appear must also be prescribed to him, and that with the most exact certainty; that he may know when to pay due obedience to the king's court, and be under no peril of incurring a contempt. And as this must be set forth with great certainty, so it must be with the known legal description of the day when he is required to appear; and if it be not, the writ is vicious, and abateable for that reason. *Trin. 25 Edw. 3. 47.* So *Pasch. 1 Geo. in B. R. Tilden v. Wheadon.* That was a *scire facias* against bail, returnable *die jovis prox. post crastinum purificationis*; whereas *crastinum purificationis* itself was on a *thursday*, and before the *thursday* following *octab' purificationis* intervened, so that was *dies jovis prox. post octabas purificationis* according to the proper description, though in fact it was the next *thursday* after *crastinum purificationis*. An exception was taken to the writ for this reason, and the court were at first doubtful, whether it might not be well enough,

enough, because though the usual way is to take the description of days from the relation they bear to the last common return, yet a writ may be made returnable at any day in the king's bench, where the proceedings are *de die in diem*, and there was in fact such a day as *thursday* next after *crastinum purificationis*, and that was a sufficient description for the defendant to know it by, and consequently to know when to come in. But after argument and consideration the court held the writ ill, and that they could not vary from their certain known description of return-days; and that writ was abated.

I have laid these matters before the court, to shew how jealous the judges of the common law have always been in these cases, and with what great care they have always preserved the exact certainty of writs and their returns. And I have made it preparatory to the fourth particular, which is,

4. The court and place where the defendant is to appear. As no reason can be assigned, why the same exactness should not go through the whole, and extend to the place of the defendant's appearance, as well as the time; so I must say, that equal certainty has been required in that also.

The instances, wherein writs have been excepted to for faults in describing the place of the return, cannot be expected to be many; because the form of that is short and easily learned; therefore as soon as clerks know any thing, they know that. And I must own I have not been able to find any cases in the books, where exceptions have been taken to original writs for an improper description of the place of the return. And I would make use of this as an argument for me, that they have been preserved up to that exquisite certainty, that there has scarce been any possibility of mistake. Therefore I rely upon this, till the other side produce cases, wherein writs that have materially varied in that particular, have been allowed to be good.

The principal question therefore will be this, whether here is such a certainty in the description of the place (of the return) in which the party is to appear, in this writ, as is agreeable to the rules of law. And I apprehend here is not.

In order to clear my way to that which is the proper consideration of this case, I must in the first place rid my hands of that load of ancient precedents, which is laid upon us. I must agree that they are for the most part as has been urged on the other side, and therefore shall give up all the precedents that were before the union:

And what I shall rely upon as the foundation of this exception is the union of the two kingdoms.

That since the conjunction of the two kingdoms of *England* and *Scotland* into the united kingdom of *Great Britain*, such a material change has been wrought in the jurisdiction of this court, and the extent of it, that in all writs concerning *English* subjects returnable here, it ought to be *ubicunque tunc fuerit in Anglia*, confining it to that part of the united kingdom called *England* only.

By the 24th article of the treaty of union, which is confirmed by 5 *Ann. c. 8.* it is provided, "That from and after the union
" there shall be one great seal for the united kingdom of *Great*
" *Britain*, which shall be different from the great seal now used
" in either kingdom."

After this union the kingdoms of *England* and *Scotland* are no more. It is the crown and kingdom of *Great Britain*, and the seal of *Great Britain*, and is so stiled in all pleadings. In consequence of that this court is also the Chancery of *Great Britain*, and so has been the stile of all bills exhibited in this court since the union.

As this alteration of names has been wrought, so there is a great and material change in things themselves. Before the union the Lord Chancellor that sat in this court, could issue no writ or instrument under the great seal, that could have any force in *Scotland*. There was then a great seal of that kingdom, and a Lord Chancellor who had the custody of it.

Since the union that seal is disannulled, and that office extinct. The general authority which it had is now vested in the great seal of *Great Britain*, except in the instances particularly excepted and reserved by the articles of union.

If so, then this court is the Chancery of *Great Britain*, and has a general jurisdiction throughout the whole united kingdom, as it had throughout *England* before the union.

The consequence of this court's having a general jurisdiction throughout *England* before the union was, that it might exist and be a Chancery in any part of *England*. And by parity of reason, the consequence of this court's having a general jurisdiction throughout *Great Britain* will be, that it may exist and be a Chancery in any place of *Great Britain*.

From hence it will follow, that it may be in *Scotland*, and then this writ requiring the defendant to appear at the day of the return before the King in his Chancery, wheresoever that Chancery should then be, did require the defendant to appear in *Scotland* at that day, in case the Chancery had been in *Scotland*.

That I take it is such an objection to this writ, as will make it illegal, and be sufficient to abate it: It is to compel an *English* subject to appear out of *England*: And that by the laws of *England* no *English* subject whatsoever can be compelled to appear to answer for a matter of right out of *England*, is a principle of law which cannot be disputed. The state of the union has made no change at all in this particular, but the law of *England* is still *lex terrae* as *magna charta* styles it, and it is to be executed within this land of *England*.

In order to explain and enforce what I mean, when I say the court of Chancery may by possibility exist in *Scotland*, I must examine a little the foundation of that matter.

The jurisdiction of this court is of a complicated nature, and includes in it great variety. But I must submit, whether that whole jurisdiction, that great diversity of power, which it has, does not flow from one spring, and is raised upon one general foundation, that is the *great seal*. 1. If it be considered as a court of state, where all publick acts of government are sealed and inrolled; that manifestly comes from the great seal, which is what gives them their legal authority.

2. If it be considered as an *officina justitiae*, for the issuing of writs; that certainly comes from the seal, which gives them being.

Of the original of the equity jurisdiction in Chancery.

3. The jurisdiction of this court, as it is a court of equity, is perhaps of all others the most difficult to be traced, both as to its foundation, and the time when it had its original. But I think there have been very great opinions, and I am apt to believe a strict search into antiquity might enable one to shew, that this jurisdiction also has taken its rise from the great seal. For the Chancery being upon the division of the King's courts naturally the *officina justitiae*, from which all original writs issued, and where the subject was to come for remedy in all cases; the Chancellor was applied to in all cases, for proper writs, where the subject wanted a remedy for his right, or redress for a wrong that had been done him. But in the execution of this authority, he was confined by the rules of the common law, and could award no writs, but such

as the common law warranted: Therefore when such a case came before him, as was matter of trust, fraud, or accident, (which are the subjects of an equity jurisdiction) the Chancellor could award no writ proper for the plaintiff's case, because the common law afforded no remedy. Upon this it is not improbable, that the Chancellors who were most commonly churchmen, men of conscience, when they found those cases grew numerous, in order to prevent the suiters from being ruined against right and conscience, and that no man might go away from the King's court without some relief, summoned the parties before them, and partly by their authority, and partly by their admonitions, laid it upon the conscience of the wrong doer to do right.

4. If it be considered as a court of common law, as the petty bag is in which we now are; the principal parts of that jurisdiction are to hold plea upon writs of *scire facias* on records of this court, upon *monstrans de droit*, and traverses of offices found upon writs issued out of this court. These likewise have their being and essence from the great seal. And this very proceeding in a *scire facias* to repeal letters patent, which my Lord Coke says in 4 *Inst.* is the highest point of a Chancellor's jurisdiction, is in a particular manner derived from the great seal; for the very end of the suit is, and so is the judgment, that they be recalled back into the same place from whence they went forth under the great seal, that they may be cancelled, that is, that the great seal may be taken off. In the case of the *Mayor and burgessees of Liverpoole* against the *Chancellor of the county palatine of Lancaster* in *B. R. Trin. 12 Ann.* there was a *scire facias* to repeal a charter granted to that corporation under the great seal of the county palatine. To this suit a prohibition was moved for, for want of jurisdiction in the court. But it was resolved, that that court had jurisdiction of the cause, and amongst other reasons which were given for that judgment, it was declared, that this authority was incident to the seal of the county palatine: That the complaint of the writ being, that the Chancellor had wrongfully put the seal to it; it was proper to be examined in that court, where the seal was kept.

Of the court
of Chancery
considered as
a court of
common law.

I have mentioned these matters in order to shew, how rationally and naturally all this power of the court flows from the seal. But there is another matter which furnishes the strongest argument in the world that it is so, and that is, that the delivery of the seal constitutes that great officer who exercises this jurisdiction, and gives him all this power.

The use I would make of this is, that if all the jurisdiction of the court of Chancery is founded upon the great seal; I apprehend,

hend, that it will also follow and attend upon it; and that wherefoever in any part of *Great Britain* the law can take notice of the great seal of *Great Britain* to be, there is also the Chancery of *Great Britain*.

Suppose his Majesty should take a royal progress into *Scotland*, and amongst his ministers should take his Lord Chancellor along with him with the great seal: I must insist, as a consequence of my argument, *there* would be the Chancery of *Great Britain*. And what shews this more fully is, that the great seal might be put to writs there, and they would bear *teste* in the King's name, *teste meipso*: Nay, they must bear *teste* in his Majesty's own name, and no other, for a *custos Regni*, or Lords Justices, can only be appointed, when his Majesty goes out of his kingdom; and the very moment he returns, their authority ceases. But since the union, when his Majesty is in *Scotland*, he is still within his united kingdom; and then by law there is no room for such officers. And if writs may issue from *Edinburgh* under the great seal of *Great Britain*, tested in the King's name; that is a full evidence, that the Chancery of *Great Britain* may be there.

But still I must insist, that by the law of *England* the subjects of *England* cannot be called to appear in the Chancery of *Great Britain* wheresoever it shall be; since as that may be in *Scotland*, it may require him to appear contrary to the law of the land, and is therefore a bad writ.

I have now done with those arguments, which I have to prove this writ to be wrong, from the reason of the thing. I come now to consider the precedents. And as to those which were before the union, they are undoubtedly as has been opened; they have authority, and they have almost universal consent of their side; and they were certainly right, and settled upon very good reason. But what I shall contend for is, that this form is now bad and erroneous, upon the failing of that reason, for which, before the union, it was good. They were good before the union upon this reason, that the law took notice that *England* was an intire separate kingdom of itself, that the great seal was the great seal of *England*, and the Chancery, the Chancery of *England*, and that the Chancery of *England* could not be out of the kingdom; and therefore it was impossible to say, that this was to summon the subject to appear out of *England*. But now the very contrary to this holds true; that the law takes notice, that *England* is no intire kingdom, but a part of *Great Britain* only; that the Chancery is the Chancery of *Great Britain*, and may have a being out of *England* in any other part of *Great Britain*. So that the reason and the presumption of law,
 2
 upon

upon which that ancient form and those precedents were established, now failing, and turning the quite contrary way; that form and those precedents will be of no authority against me in this case; but will rather be authorities for me, because nothing is more certain in reasoning, than that from foundations and premisses, which are contrary one to another, contrary conclusions ought to be inferred.

As to the precedents since the union, they are either such as have passed of course in the office, *sub silentio*, without examination; or they are such as have come in judgment before the court, and undergone litigation, that is, judicial precedents.

Now as to the first kind of precedents, of what authority are they? Surely they are of little or no authority. They are the work of clerks in the office, without consideration, and without knowing the opinion of the court. And if such precedents were suffered to prevail against the reason of the law, that would be to suffer the clerks to make the law. All the precedents which have been produced on the other side are of this kind, and they have not shewn any one judicial precedent in their favour, the reason of which is, that there are none.

But I apprehend the strength and weight of the precedents are with us. I have in my hand a list of near thirty writs upon the files of the petty bag, issued since the union, which are all made returnable *in Cancellar' ubicunque tunc fuerit in Anglia*, in the manner we contend for; and I have also a judicial precedent, a judgment of the court in a case of this kind, which I take to be an authority in point for me. And I am the more encouraged to think so, because the other side have thought fit to anticipate me in it, it glared them so full in the face. That was a *scire facias* against Sir Cleave Moor and Peter Persehouse upon a recognizance, given in this court, made returnable *coram Domina Regina in Canc' sua ubicunque tunc fuerit in Magna Britannia*. It was teste 11 Jan. anno 9th of the late Queen. To this writ there was a plea in abatement, and Mr. Attorney General, that now is, took an exception, that it was wrong, and ought to have been made, *coram Domina Regina in Canc' sua ubicunque tunc fuerit in Anglia*. And he put several cases, where since the union the great seal, and consequently the Chancery, might possibly be out of *England*, and yet the subjects of *England* not obliged to appear there. And that exception made so great an impression upon the court, that my Lord Harcourt, who then sat here, abated that writ for this fault only. And what explains this authority further is, what was done upon it afterwards in conformity to that judgment and the opinion which

was then delivered; for the new writ was not made returnable in *Canc' ubicunque tunc fuerit* generally, but *ubicunque tunc fuerit in Anglia*, as we contend this ought to be.

And really I am at a loss to find any ground, upon which the present case can be distinguished out of that authority. For why was the writ in *Persebouse's* case held bad? was it not because since the union the Chancery of *Great Britain* may be in any place of *Great Britain*, and consequently a writ which required the party to appear in that Chancery, wheresoever it should be in *Great Britain*, required him to appear in *Scotland* in case it should be there. So in the present case, shall not this writ *pari ratione* be bad, because since the union the Chancery of *Great Britain* may be in any place in *Great Britain*; and consequently this writ, requiring the party to appear in that Chancery wheresoever it shall be, requires him to appear in *Scotland*, in case it shall be there. I own I cannot discern any difference between the two cases.

By this time I hope it sufficiently appears, that I was well warranted in saying, that the strength and weight of the precedents is with us. For if the precedents *sub silentio* are both ways, and there be no judicial precedent with the other side, but there is one in our favour; that judicial precedent will turn the scale, and over-balance the rest; especially if the circumstances, even of our precedents which have passed *sub silentio*, are considered. For they have most of them, if not all, been since the judgment of the court in that case of *Persebouse*, which shews what was then apprehended to be laid down as the standing rule of the court for the future. And I am informed, they are all the cases since that judgment, which have been of considerable consequence, and can be supposed to have undergone the consideration of counsel. And some of them have been litigated, and come before the court upon other points. Amongst the rest, there is the great case of the *Scire facias* against the charter of *Liverpoole*, which caused a mighty struggle in *Westminster-hall*, and there the return is confined to *England*.

In order to avoid the force of this argument in the present case, some objections have been made of the other side.

Where erroneous process is aided by appearance, and where not.

The first is, that our exception comes too late, for that it is now aided by the appearance of the defendant. And this was enforced by observing, that it was absurd to say this defendant had an hardship put upon him by being summoned to appear in *Scotland*, when the court was at *Westminster* at the return, and he has appeared here.

The answer to this is, that it is not helped by appearance, because the defendant has come in specially, saving to himself all advantages whatsoever, and has challenged this defect by plea.

I may agree, without prejudice to this question, that possibly if the defendant had come in, and not relied upon this exception, but pleaded over some matter of bar, that might have precluded him from taking this advantage afterwards. But when he expressly comes in for this special purpose, I apprehend he may insist upon it.

I do admit, that any error in *mesne* process is salved by the party's appearance, and he shall not afterwards take advantage of it; because the only intent of *mesne* process is to bring the defendant into court, and when he is come in, that is out of the case; for he might have come in upon the writ without it. But an original writ (as a *scire facias* to repeal letters patents was determined to be in the case of *The King v. Eyre*) is of another nature; for that is not only to bring in the party, but also to found the jurisdiction of the court in that particular cause, and to be the groundwork of all the proceedings of the court afterwards. And I know no case in the law, where it has been held, that an appearance has cured any error in the original writ.

In the case of *Wilson v. Law*, Trin 6 W. & M. in B. R. Salk. 59. In an appeal of death, the defendant prayed *oyer* of the original writ and return, and thereupon demurred in abatement, as he might do in appeal. Upon the argument an exception was taken to the sheriff's return upon the original; and the answer was, that it was helped by the appearance. But the contrary was resolved by the court; for that appearance only helps, when the party comes in and pleads to issue, not when he comes in and challenges the defect. In the case of *Widdrington v. Charlton*, B. R. Trin. 11 Annæ, it was held, that error in *mesne* process was aided by appearance. But in that case Mr. Justice Eyre in giving his opinion, expressly allowed the authority of *Wilson v. Law*, and distinguished it, by observing that there the exception was to the return of the original writ, and therefore the appearance could not cure it: but here (said he, and so was the opinion of the court) he shall answer to the original writ, because that is good; and it was held that there was no difference between an appeal and any civil action, as to the effect of an appearance to cure errors; but that the effect of that was the same in all cases.

As to the objection, that it is absurd for a man to come, this court here sitting, and object to the writ, that possibly he might have.

have been hurt by not knowing certainly where to appear, or by being made to appear in Scotland,

I take it, there is no absurdity at all in that, for the law of England, which delights in certainty, is more reasonable than to put a man even to the hazard of being hurt by an illegal writ, either in his liberty or his freehold, but he may come in and take advantage of it, before he is actually affected by it.

Thus in cases of *misnomer*, where there is an original issued against a man, or a bill of indictment exhibited against him, by a wrong Christian name: if proceedings were had upon that writ or indictment, they could not finally affect him. If he was to be arrested by process upon such writ or indictment, he might have an action of trespass and false imprisonment against the officer; nay, if he made opposition and killed him, it would be but manslaughter, *Cro. Car.* 538. But notwithstanding all this, to prevent any possible danger to this man's liberty or property, though he could not effectually be hurt by it, the law allows him time to come in and plead that *misnomer* to the writ or bill, and it shall abate for that reason; and the defendant not be put to answer, though he is in court.

And this he may do voluntarily, without shewing that he was brought in either by summons or compulsion; only saying, that the defendant (suppose J. S.) *versus quem* the plaintiff *tulit breve suum*, or *exhibuit billam suam, per nomen Samuelis*, is named John and not Samuel; and the writ shall abate.

I mention this to shew, how carefully the law has guarded the subject from receiving injury by erroneous proceedings; that barely upon the possibility of his being affected, he may come and take advantage of it, and avoid those proceedings, without staying till he is actually hurt by them.

And if he may do this in mere personal actions, much more may he do it in cases where his freehold comes in question. And that it does in this case; for this is a *scire facias* to repeal a grant of an office for life, and consequently to oust the party of that freehold, and for that reason has something in it of the nature of a real action. And it would be needless to mention, what great advantages the law allows to defendants in real actions in point of process and pleading, in order to fence and secure the freehold of the subject.

Another objection was, that to determine this writ to be wrong, would be to overthrow a multitude of judgments since the union.

If this exception depends upon the same reason with that which was taken and allowed in *Persebouse's* case (as I have endeavoured to shew it does) and is only a consequence of the rule which was then laid down; then if the precedents should be shaken, it will be owing to that judgment, and not to the judgment which we contend for in this case.

But I do not remember ever to have heard that argument allowed, where the former precedents are both ways, as they are in this case; and besides, where there was a judicial precedent in favour of the exception. For more mischief has always been apprehended from shaking one judicial precedent, than a hundred precedents *sub silentio*.

I take it, that this apprehension of danger is but a vain terror, and that there can be no such inconvenience; for that where there are judgments, this exception will be out of the case, and the defect cured. Where the defendant has come in, and not challenged the exception, but pleaded over some matter of bar; that is a waiver of it, and he cannot take advantage of it afterwards by writ of error; according to the rule which was laid down by Mr. Justice G. Eyre in the case of *Wilson v. Law*, that an appearance will help, where the defendant comes in and pleads to issue, and does not challenge the defect of the writ.

There are many cases, where want of challenge of the party will cure a defect even appearing upon the face of the writ. As in debt upon simple contract against an executor, which does not lie; yet if he pleads to it, and a verdict be against him, he shall not take advantage of it in arrest of judgment, or by writ of error. *Yelv.* 56. 1 *Lev.* 201, 261. In the case of variance from the *Register*, that may be pleaded in abatement, but if the defendant waives that opportunity, he cannot take advantage of it afterwards. And so it was held *Trin.* 12 *Ann.* B. R. in the case of *Skinner v. Newton*.

Bootle replied: The jurisdiction and process of this court neither is, nor was designed to be altered by the Union; for there is an express reservation. Though if there had not, no body can think it would have made any alteration: However it was thought proper to declare so, *in majorem cautelam*, that as to all matters concerning *England* the Great Seal should be used as it was before the Union.

Ubiunque fuerit generally, differs from *ubicunque fuerit in Magna Britannia*: The latter can by no intendment be set right, but the former may, according to the known rule of construction, *verba generalia generaliter sunt intelligenda*.

Precedents, though they pass *sub silentio*, are surely evidences of the forms of the court. And thus far they are authorities, that they shew it was not thought necessary to alter them, when in 10 Ed. 1. *Wales* was united to, and became parcel of the dominions of *England*; nor when *Calais* was so likewise. Two or three precedents make not the law against a multitude to the contrary. 39 H. 6. 30. 4 Ed. 3. 43. a. Long Qu. E. 4. 110. It was upon the strength of the precedents, that the case of *Bewdly* was resolved, and they were there set up in opposition to, and prevailed against the express words of the act of parliament.

But if we should admit their precedents, yet they must admit ours too; and then they being both ways, either form is good: though by the way I must observe, that the forms of the *Register* cannot be altered, but by act of parliament.

Sir Joseph Jekyll, Master of the Rolls. That is certainly so, and therefore if this form be warranted by the *Register* and the precedents, I think nothing can be stronger. This court is still the Court of Chancery of *England*; it is the Great Seal's being the Great Seal of *Great Britain*, which occasions the bills to be directed to the Chancellor of *Great Britain*.

I think there would have been no clashing of jurisdictions, if the special reservation had been omitted. The 19th article is a covenant, that the jurisdiction of *Scotland* shall remain notwithstanding the Union; and as it preserves the former jurisdiction to *Scotland*, so it excludes the *English* jurisdiction from extending itself thither.

Parker, Lord Chancellor. The words *ubicunque fuerit* were as large as possible, and when *Calais* was part of *England* might extend to that, though the subject would not be bound to appear there. But when you go to explain it, it must be right; therefore in *Magna Britannia* is certainly wrong. All the powers of this court flow from the Great Seal, which though it is now made the Great Seal of *Great Britain*, yet the act has not made the Chancery so. The powers of the Chancery, as a Court, are in private property; and the articles excluding that, the Chancery as a court of private property

perty cannot be there. All contempts of this court will be discharged, if this form should not be established. In the case of *Bewdly* I thought the objection was very strong, but it was got over for the necessity of the thing, and not barely for the sake of uniformity: And this case and that are both in the same reason. The defendants must answer over. *Respondes ouster agard.*

Dominus Rex vers. Decan' et Capitul' Norwici.

MANDAMUS to admit Dr. *Sherlock* to a prebend of the cathedral church of *Norwich*. And the writ suggests, that Queen *Anne*, by letters patent, 26 April, 13th of her reign, incorporated Dr. *Sherlock*, then master of *Catharine hall* in *Cambridge*, and the fellows and scholars for ever; and grants that the then master (naming him) should succeed to the next vacancy of a prebend in *Norwich*, and his successors, masters of *Catharine hall* after him, requiring the dean and chapter to assign him *stallam in choro et vocem in capitulo prout mos est*. Which letters patent were confirmed by the statute 12 Ann. against mortuaries. And one of the prebendaries being now dead, this is the first vacancy, to which the dean and chapter are required to admit Dr. *Sherlock*. They return, that King *Edward* the sixth, by letters patent, 7 November, first year of his reign, erected the deanery and chapter of *Norwich* into a corporation, and endowed the church, and gave them perpetual succession. That neither he, nor Queen *Mary* or Queen *Elizabeth*, ever made any statutes for the government of the corporation. But King *James*, by a body of statutes ordained, that as often as there should be any vacancy, the dean and chapter should admit such person as the King should nominate under the great seal. And further (which is the clause upon which the question arises) that none should be admitted to be dean or prebendary, who before was prebendary of any other cathedral church. And that these are the statutes which they have sworn to observe. And for that Dr. *Sherlock* is dean of *Chichester*, and a prebendary of *St. Paul's*, they refuse to admit him; *et ob nullam aliam causam*.

Mandamus to admit a prebendary to his stall and voice.

12 Ann. st. 2.
c. 6.

Reeve argued that the return was insufficient, and for a peremptory *mandamus*. The letters patent being confirmed by act of Parliament, we are now as it were upon the construction of a statute, and as if every part of those letters patent was incorporated into the body of the act. And as such it is of force enough to repeal and annul all former ordinances or usages contrary to or inconsistent with it. So that whatever questions might arise upon the letters patent, if they stood barely upon their own strength, and how

how far they would prevail to set aside and controul the local statutes of King *James*, will be intirely out of the case.

It will not be denied, but here is an exprefs intention to unite the mastership of *Catharine hall* and this prebend in one and the same person for ever, and that Dr. *Sherlock* is to be the first person in whom this provision is to take effect. But what they insist upon is, that he is a person incapable to enjoy this prebend under the local statutes. I admit he is, if those statutes are in force, which I have shewn they are not. But then they say, our letters patent have in this particular affirmed the former law, for they only require the admission to be *prout mos est*, which *mos* is *mos ecclesiae* the constitution of our church, and that constitution obliges us to refuse any person, who is at that time prebendary of any other church. So that *prout mos est* is as much as to say, that the master of *Catharine hall* shall be admitted, if he be capable according to the constitution.

But this is going too far, if we consider where those words come in. The letters patent say, that Dr. *Sherlock* and his successors, masters of *Catharine hall*, shall be *habiles et in lege capaces*, to hold and enjoy this prebend, and upon every vacancy *mandantes et requirentes* the dean and chapter to admit them accordingly, *prout mos est*, in the usual form.

The oath in which the dean and chapter are bound to observe the former statutes, is of no force, now those statutes are repealed.

It is considerable, that as Dr. *Sherlock* is the first named, if he should be held incapable, whether this provision can ever take effect, and whether his successors will not be in the case of remainder men without any particular estate. No body can take if the doctor cannot; and must this prebend be in perpetual abeyance, which may happen to be the case, for his successors may be dignified as well as himself. And in this case it is not denied, but that he is master of *Catharine hall*, and as such he is intitled to this prebend.

Reynolds Serjeant contra. We do not in this case debate the validity of the grant, but only offer to excuse our non-admittance. Nor do we rely upon the words *prout mos est*, it is but *expressio eorum quae tacite insunt*, and when the office is given to Dr. *Sherlock*, he will be intitled to be admitted without that clause.

This is a common appropriation, and by it all the local statutes expressly contradictory to it will be repealed, as if they had disabled every master of a college, and then the other had come and said, the master of *Catharine hall* shall be prebendary. But what I contend for is, that the subsequent provision meddles not with any collateral incapacities, such as Dr. *Sherlock* lies under by being prebendary of another church. Suppose he should refuse to subscribe, as the 14 *Car. 2. c. 14.* requires; it is true he would have a right to the preferment as master of *Catharine hall*, but before he gets possession of it, he must remove his incapacity. And here I admit, if he resigns his other prebend, he will be intitled to be admitted. So that this is only a personal disability, arising from his own act, from which he may free himself whenever he pleases. Suppose he had been able at the time of the statute, so as then the local statutes would not be affected; shall his subsequent acceptance of a prebend amount immediately to a repeal of the former provision?

As to the office's being in abeyance, there is no need for that. Dr. *Sherlock* is intitled whenever he renders himself capable, and till then the 28 *H. 8. c. 11.* has given the profits of vacant benefices to the next incumbent.

Reeve replied. This case can never be brought within the rule of legal disabilities by act of Parliament, where a man is obliged to do any act, to give the publick satisfaction of his sufficiency for the office he is to be admitted to. *Curia advisare vult.* And afterwards

Pratt C. J. delivered the resolution of the court. We are all of opinion, that the return is insufficient, and that there ought to be a peremptory *mandamus*. Upon the first letters patent, *Jac. 1.* the power of the King as founder is restrained, and the dean and chapter as it stood upon those statutes, might well refuse such a person as Dr. *Sherlock*. And so they might upon the letters patent of Queen *Anne*, for she having but a bare right of nomination, could never unite the canonry itself to the mastership of *Catharine hall*. They may perhaps have their effect as a perpetual nomination; but there is no occasion to determine that point, since here is an act of Parliament, which has confirmed these letters patent, and by which we are of opinion, the canonry itself is well united to the mastership of *Catharine hall*. And it not being denied, but that Dr. *Sherlock* is master of it, he is as such intitled to a peremptory *mandamus*.

Pitton *vers.* Walter. At Surrey assizes.

Postea, where
evidence.

PER Pratt C. J. The bare producing the *postea* is no evidence of the verdict, without shewing a copy of the final judgment. Because it may happen, the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial, who is since dead.

Heralds books
evidence of a
pedigree.

Salk. 281.

The question being, whether the lessor of the plaintiff was heir at law to him that last died seised; to prove the pedigree, the Chief Justice admitted a visitation in 1623. made by the heralds, entered in their books, and kept in their office, to be read in evidence: He also admitted the minute book of a former visitation, signed by the heads of the several families, which was found in the library of my Lord Oxford.

Easter

Easter Term

5 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Nicholas Lechmere, Esquire, Attorney General.

Sir William Thompson, Knt. Solicitor General.

Between the Parishes of Burclear and Eastwoodhay.

ON a special order of sessions the case was stated for the opinion of the court. That *Abrakam Hatchett*, being legally settled in the parish of *Burclear*, about 18 years since married and had four daughters. About eight years since he came with his wife and children into *Eastwoodhay* as a certificate-man. Whilst they were there, a copyhold of 20*l. per annum* descended to his wife, which they enjoyed for five years till her death, and then according to the custom of the manor it descended to the eldest daughter. About half a year ago the man asked relief in *Eastwoodhay*, and thereupon the sessions send him back to *Burclear*. Before they took up the case upon the special state of it, an objection was made to the order of the two justices, that they only adjudge him likely to become chargeable; whereas a certificate-man is not removable, till he becomes actually so. And though the order of

Descent of a copyhold to a certificate-man gives him a settlement.

sessions states, That he asked relief of the parish; yet one order shall not be made good by another, no more than it can by matter alleged in the return. To which it was answered, that if the order of two justices is to stand by itself, then it will be well enough; for it is a general order of removal, wherein no notice is taken of his being a certificate-man, and therefore *likely* is sufficient. Besides, that order is intirely out of the case, for the special matter being referred to the court, they are to judge upon that only. *Quod fuit concessum per curiam*. Then it was moved to quash the special order, because though the man came into *Eastwoodbay* with a certificate, yet the enjoyment of the copyhold for five years, during which time he was not removable, had gained him a settlement there. On the other side it was said, That the 9 & 10 W. 3. c. 11. having provided, that a certificate-man shall not gain a settlement, unless he takes 10 *l. per annum*, or serves a parish office; and that being an explanatory act, which is not to be explained; therefore this man not coming within either of those cases, was notwithstanding the descent of the copyhold to his wife, removable upon his becoming a charge to the parish. *Et per curiam*: This is not an explanatory, but a new law, and must therefore receive a liberal construction. The exceptions in the statute prove this case, being a case more reasonable than either that are there mentioned. If a certificate-man by taking 10 *l. per annum* gains a settlement, *a fortiori* shall he that has an estate of his own, especially in this case, where he does not come to it by act of his own, (which might favour of fraud) but it is cast upon him by the act and operation of law. If he that serves a parish office gains a settlement upon account of his presumed ability, with greater reason shall he that has ability of his own visible to all the world. It has been already adjudged, that any other person by the descent or purchase of a freehold or copyhold, or by becoming intitled to a lease for years, gains a settlement; and it cannot be supposed the Parliament intended, to put a certificate-man in a worse condition. The value of the copyhold is not material, for it is its being his own makes him not removable. A man must take a tenement of 10 *l. per annum*, to gain a settlement; but yet he may come to settle upon a tenement of his own, though of ever so small a value. This man therefore being for five years irremovable from *Eastwoodbay*, has gained a good settlement there, and the order to remove him from thence must be quashed.

Salk. 524.

Atkin

Atkin *vers.* Barwick.

THE plaintiff, as assignee of the effects of *Cripps* and *Quarme* bankrupts, brings trover against the defendants for several parcels of silks. And upon the trial a case was made for the opinion of the court.

A delivery to *A.* to the use of *B.* upon a precedent consideration is not countermandable, but vests the absolute property in *B.* before agreement.

That the defendants were mercers and partners in *London*, and usually dealt with *Cripps* and *Quarme*, who were also partners, living at *Penryn* in *Cornwal*. And on 7 *April* 1715. the defendants by their order sent the goods in the declaration, and gave them credit in their books. They being at the same time indebted to them for other goods. 18th of *May* following *Cripps* and *Quarme*, without the knowledge of the defendants, sent divers silks (the same sent down in *April*) to Mr. *Penballow* at *Penryn* for the use of the defendants. *June* the 4th *Cripps* and *Quarme* became bankrupts. *June* the 6th they wrote a letter to the defendants, signifying their affairs were in a declining condition; and thinking it not reasonable, the last parcel of goods should go to satisfy their other creditors; therefore they had not entered them in their books, but left them with *Penballow*, who had orders to deliver them to the defendants. *June* the 9th a commission of bankruptcy issued, and the effects were assigned to the plaintiff. *June* the 13th the defendants received the letter, which was the first notice they had of the delivery to *Penballow*, and as soon as possible they signified their consent to take the goods again.

Reeve pro querente. The bankrupts had undoubtedly a good property in the goods by the sale made the 7th of *April*. That is a point I need not labour. But the question now to be considered is, whether any thing appears, to divest that property, before the act of bankruptcy. I shall maintain the negative of this question. The goods it is true were delivered for the use of the defendants, but that delivery was without their knowledge. They were not obliged to accept them, and therefore before acceptance the property could not be altered, and the bankrupts might have countermanded that delivery. If instead of sending them to *Penballow*, they had kept them in their own hands, till an answer to the letter; would that have altered the property? Certainly it would not. This letter can amount to no more than a proposal, and therefore the subsequent consent (if it has any retrospect) can only have relation to the time of the proposal, which was two days after the act of bankruptcy. Though the delivery is stated to be to the use of the defendants, yet it does not appear to be in satisfaction of the precedent

debt; so there is no consideration, and then the delivery is fraudulent as to creditors. 1 *Mod.* 76.

Darnall Serjeant contra. By the delivery to *Penballow* the property was altered before acceptance, and the bankrupt could not countermand it; for there was a good consideration, viz. in satisfaction of the debt; and this is explained by not entering it in their books, and their unwillingness that the other creditors should come into an average for these goods. This does not take effect as a gift, but as a satisfaction, and therefore not countermandable. *Dy.* 49. a. 2 *Roll. Rep.* 39. 2 *Leon.* 30. And since it cannot be countermanded, the person to whose use they were delivered, has an absolute property in them, till disagreement. 1 *Roll. Abr.* 32. pl. 13. *Sty.* 296. *Yelv.* 164. *Cro. Jac.* 667. Here was no disagreement, but as speedy a consent as possible.

Reeve. An accord executory is no satisfaction, before it is executed. It is admitted that a delivery without consideration may be countermanded, and I insist this is such; for the precedent debt is not merged, because the party could not plead this re-delivery in bar of any action for the value of the goods, unless they actually were returned to the person who sold them, or he signified his consent, which was not done before the act of bankruptcy committed.

C. J. The question is, whether by the delivery to *Penballow*, without more, the property was altered; for if that delivery was countermandable, then the act of bankruptcy intervening before any assent of the defendants, will prevent the property from vesting in them. I think upon the circumstances, that there appears a sufficient consideration to toll a subsequent power of countermanding, and that this delivery was in satisfaction of the debt. It is true the bare delivery will not extinguish it, because he had a power to dissent; but yet according to *Butler* and *Baker's* case in the 3d *Report*, the absolute property passes, subject to a disagreement by one of the parties: The contract does not stand open till agreement, but is compleat, unless there be an actual disagreement. The consequence of all this is, that the delivery to *Penballow* to the use of the defendants, being before the act of bankruptcy, and founded upon a good consideration, transfers the absolute property to them, it being stated that they never disagreed. *Powys J. accord.*

Eyre J. All these cases go upon the distinction, where the delivery is with and without consideration. *Dy.* 49. If with consideration, and the delivery is of money, debt lies. *Yelv.* 23, 24. 2 *Cro.* 687. *Rast.* 159. If of goods, trover. 1 *Bulst.* 68. The

precedent

2 Ven. 198.
Show. Ca.
Parl. 150.
Salk. 618.
Thompson v.
Leach.

precedent debt is a sufficient consideration, and it vests before notice; for it being to his benefit, a disagreement shall not be presumed.

Fortescue J. Property by our law may be divested, without an actual delivery; as a horse sold in a stable. But it is otherwise by the civil law. A general bailment alters no property, but this is not such. It cannot be taken for a resale, for defect of contract; but it is properly a payment in satisfaction. It is most reasonable to apply it to discharge the debt, and not as a gift; for a man is just before he is kind: And since he paid it in satisfaction, we will intend an acceptance, till the contrary appears. *Judicium pro defendantibus.*

Bradshaw vers. Mottram.

THE plaintiff brought a *qui tam* upon the stamp act against the defendant, for marrying without licence; and had him in execution, where he had lain some time. And now *Yorke* cited the 18 *Eliz. c. 5. §. 3.* and produced an affidavit of the poverty of the defendant, and had the leave of the court, that the plaintiff might compound with the defendant. Leave to prosecutor to compound with defendant.

Dominus Rex vers. Saunders.

YORKE moved for leave for the coroner to take up the body, and take a new inquisition, according to 2 *Sid. 101. Salk. 377.* which was granted; and it was said, the coroner could not do it without leave of the court. Leave to take new inquisition super visum corporis.

Hudson et ux' vers. Ash.

At Nisi prius in Middlesex, coram Pratt, C. J. de B. R.

THE plaintiff's wife was taken up by warrant of a justice of peace, for assaulting the overseer of the parish, and assisting to the escape of a woman delivered of a bastard child. When she came before the justice, she could not find bail; but at her request he gave leave for her to lie that night at the constable's house, in order to get bail against the morning. Then one on her behalf demanded a copy of the commitment, which not being delivered, an action was brought upon the *habeas corpus* act. *Et per Pratt, C. J.* The questions are two, whether the defendant be an officer, and whether Constable, within habeas corpus act.

whether the plaintiff's wife was detained by virtue of any warrant within the meaning of the statute. As to the defendant there is no doubt but a constable is within the act, but I do not think this action well brought. For the woman was not in his custody by virtue of any warrant; what warrant there was, was only to bring her before the justice, and that was fully executed by so doing; and the time she staid at the constable's after that, was not by virtue of any warrant or commitment, but at her own consent and desire, to remain under a voluntary custody: Neither is this a case within the mischief of the statute which was indefinite commitments. The plaintiff was called. Then the defendant moved for treble costs, being a constable. But the Chief Justice would not certify, because this custody was not in execution of his office.

Tremain's case. In Canc'.

Infant.

BEING an infant, he went to *Oxford*, contrary to the orders of his guardian, who would have him go to *Cambridge*. And the court sent a messenger, to carry him from *Oxford* to *Cambridge*. And upon his returning to *Oxford* there went another, *tam* to carry him to *Cambridge*, *quam* to keep him there.

Turner *vers.* Trilby. At Guildhall.

What necessities to charge infant.

PER Pratt, C. J. Necessaries for an infant's wife are necessities for him; but if provided in order for the marriage, he is not chargeable, though she uses them.

The East India Company *vers.* Atkins. In Canc'.

Where a man submits to be examined as to matters which will be penal upon him, equity will not interpose.

S. C. Comyns 347.

MR. *Vernon pro defendente*, in maintenance of the plea. This bill is brought by the *East India* company, for a discovery of a private trade, suggested to have been carried on by the defendant and the other supercargoes of the *Stringer* galley, which was sent by the company in the year 1715 upon a voyage from hence to *Canton* in *China*, and thence to return to *England*.

They first offer to waive the penalties and forfeitures that he might incur by such discovery; and then they strengthen themselves by a covenant entered into by the defendant, by which he obliges himself to answer to any bill to be brought against him for any discovery in any court of equity, and not to plead the acts of Parliament, which inflict those penalties and forfeitures.

As

As to their waiving all penalties and forfeitures which might be incurred by the defendant by such discovery, we apprehend it is not in the power of the plaintiffs to indemnify us against them. Therefore I must take notice what discovery they pray.

They charge that the defendant and the other supercargoes agreed to receive on board several goods from the *Thurston* galley: That for that purpose the *Stringer* and the *Thurston* sailed together to the *Downs*, where the *Stringer* took on board such goods as had been agreed upon. That having so done, they proceeded to *Canton*, where they in a private manner disposed of those goods, and with the produce of them bought another cargo of goods, which they put on board the *Stringer*: That they appointed the *Thurston* pink to meet them in their return; but failing in that design they touched at *Lisbon*, and there sent away several parcels of these private goods: And other part was put on board the *Succefs*. And after all this they met with the *Lemmon* at sea, on board which they put the remainder of the goods, and they were sent to *Holland*.

We apprehend, if we are bound to answer this charge, we shall be subject to all the penalties appointed by the act 9 *W. 3.* which are 9 *W. 3. c. 44.* loss of the ship, goods and double value; and also of 6 *Ann.* against 6 *Ann. c. 3.* breaking bulk. By the act 9 *W. 3.* three fourths of the forfeitures are given to the company, and so far as that goes perhaps they may waive: But the other fourth and the ship and the double value they have no pretence of a right to, or power to waive, that being given to the informer. Therefore to give some colour to this offer, there is an allegation in the bill, that the company is become the informer, and so they may waive the whole penalty.

To this it was objected the last time, that although it is alleged that they have informed, yet it is not set out where or when they informed, or for what goods. If they would have enabled themselves as informers, they ought to have shewn the information, and that it related to these goods, and these facts charged in the bill. The plaintiffs were so conscious of that, when a person on behalf of the defendant went, in order to have a sight of the information, and to see whether the company had a power to make such an offer, he was denied a sight of it. Therefore we think, that ought to be laid out of the case, and by consequence their waiving the forfeiture will go for nothing.

As to the penalties in 6 *Ann.* against breaking bulk, by which it is enacted, that all goods to be laden in the *East Indies* shall be brought to some port of *Great Britain*, and there unladen, and

sold by the company at a publick sale by inch of candle: The penalty is forfeiture of the value of the goods, one moiety to the crown, the other to the informer or seizer. And they do not pretend a title to that forfeiture.

They endeavoured to evade that act, by saying it respected the company only, but not those that traded privately. But surely that cannot be the intent of the act, that when those who are licenced to trade to the *East Indies* are liable to these penalties, he that trades in a clandestine manner shall be in a better case. But to put that out of dispute, upon reading the words 6 *Ann.* it is enacted, "That all goods which shall be laden in the *East Indies* upon any ship or vessel belonging to any of her majesty's subjects with intent to be transported, shall be brought to some port of *Great Britain*, and there be unloaden; upon pain of forfeiture of all such goods, one moiety to the queen, and the other to the informer." So that if the defendant should be forced to make this discovery, he must be liable to the forfeitures in that act, and the waiver of the plaintiffs will not save him harmless.

Taking that to be so, we apprehend we are in the common case, that no court of equity will compel a defendant, to set forth any thing, that will subject him to penalties. But on the contrary a court of equity relieves against forfeitures. The plaintiffs being aware of this, have insisted upon a covenant, they have got the defendant into, that he would at his return to *England*, if required, answer upon oath to such bill as should be brought against him for a discovery, and not demur or plead in bar: And the company agree to waive the forfeitures, and accept of their damages, which amount to 90 *l. per cent.* and are as much as the forfeitures.

This is the first of the kind that has come into a court of equity, and if it should be admitted, may be of dangerous consequence. I would observe, that we are not plaintiffs to be relieved against this covenant, though the manner of obtaining it is extraordinary. After these gentlemen had been taken into the company's service, and had prepared every thing for their voyage; then they must execute this covenant, or else be discharged. These are hard terms to be put upon any man, but it is what the company has practised. Then they are also to contract, upon what terms they are to receive their wages; and though they go upon a trading voyage from port to port, and deliver their loading; yet there is a covenant, that if the ship miscarries in her return, they are to lose their wages. This covenant, as often as it has been brought in question, has been set aside.

The next thing I would observe is, the consideration given to these people for entering into this covenant, which is an undertaking on the company's part, that they shall not be subject to any forfeitures or penalties. That seems to be the consideration. But that is an undertaking, which the company cannot pretend to make good. And then the covenant is without consideration.

Besides, if the plaintiffs are to have any benefit of this covenant in a court of equity, it must be by praying a specifick performance of it. And there is always a difference taken, between a circumstance of fraud in order to set aside a covenant, and where there is room to decree a specifick performance of it.

It is objected, that a man may waive any benefit the law gives him, and enter into an agreement for that purpose. To this I answer, Those agreements have always been ill looked upon in a court of equity. Where a man gives a mortgage on his estate, with a covenant not to bring a bill to redeem; it cannot be pretended, but that notwithstanding such covenant, he may bring his bill, and the court will decree a redemption. Nay though he confirms it with an oath, for so far Mr. *Stifthead* went as to take an oath from the mortgagor, and yet in that case the court decreed a redemption. Where a man borrows money upon a mortgage, and covenants that if he doth not pay the interest yearly, such interest shall carry interest; this seems to be a reasonable compensation to the party, for being disappointed of the receipt of his interest. And yet a court of equity will relieve against such a covenant. Though the party that enters into those covenants, may be said as much to forfeit or waive the benefit of a court of equity, as we have done in this case.

We apprehend the covenant to be of an extraordinary nature. It is, that a man shall not make part of his defence. That when he comes before the court, he shall not set forth the truth of his case. Indeed in a covenant to suffer a common recovery, there is an agreement what defence the parties shall make; but was it ever known in a court of equity, that a covenant to strip a man of his defence was allowed? If you can abridge a man of one part of his defence, why not of the whole? If this is good, it may be carried further, and you may have a covenant, that if a bill be brought, the defendant shall appear and make default, and the bill be taken *pro confesso*. And that will be a new step, and it will concern a court of equity to withstand all such attempts as this.

The

The covenant is, that he shall not plead the penalties and forfeitures; but what if he does plead? Is the court to pass over that part, where he has pleaded them? Will the court upon an allegation of such a covenant pass over the merits of a cause? No truly, they will rather go into them, in abhorrence of such a practice.

We cannot apprehend of what weight this covenant is in a court of equity. We do not know what a court of equity has to do with a covenant, unless it be executory; there a man may come to have a specifick performance of it: But can they pray a specifick performance of this covenant? He has covenanted, he will not plead, and yet he has pleaded. Is there any thing executory in this? They may take what advantage they can of this covenant at law, but a court of equity will add no weight to it, especially when it is to subject a man to a penalty, contrary to the business and intent of a court of equity, which is to relieve against penalties and forfeitures.

The rule in equity, that no defendant shall be compelled to subject himself to penalties and forfeitures, is founded on natural right and justice. It is a rule that has been observed inviolably without exception till this attempt. Therefore as we cannot be acquitted by the company from these forfeitures, it would be a monstrous thing for a court of equity to make us liable to them; and the rather in this case, because it is making a strain, upon an allegation of the company, and barely upon an apprehension that they have been injured by the defendants. Whereas it appears by the pleadings, that they never had a better voyage or more profitable return, for they made 200 *l. per cent.* profit.

They surmise, that the goods put on board the *Stringer* galley by the defendants were of great value, and that their tonnage would amount to a great sum; whereas it appeared upon the survey, when the ship arrived in the river, that she was full loaden with the company's goods. So that their whole complaint seems to be conjectural and groundless, and has no oath to support it: Or if there was any real ground for it, the plaintiffs may have their remedy at law. We do not come into this court to be relieved against this covenant; but for the plaintiffs to take from us our lawful defence, and thereby to subject us to forfeitures and penalties, there is no ground for it; and therefore we hope our plea shall be allowed.

Sir *Thomas Powys contra.* In order to remove the prejudice which the defendants have endeavoured to bring the company under, by

representing them as imposing or requiring a very extraordinary covenant from them, I would observe, that the act 9 *W. 3.* has established an oath to be taken by members of the company, that they will not send to the *East-Indies* any goods for their private account, contrary to that act. So that we are upon an act of Parliament, and the covenants the company takes from their supercargoes, is in pursuance and execution of that act; and there is nothing charged in this bill but what is forbidden by that act; for we ask them, Did not you carry more goods than the company allowed? Did you not when you went out make an agreement with the *Thurston* galley, that she should at high sea lay on board such and such goods? And so go on with the several parts of the fraud.

Now as to the outward voyage, the act of Parliament inflicts no penalty, and only forbids all other persons, except such as by that act may trade, their servants or agents. The defendants are the agents of those persons who may trade thither, and not within the description of those who are by that act subjected to penalties for exporting goods to the *East-Indies*. Therefore as to the outward voyage, they are not within any of the penalties of that act.

But suppose these men should not be taken (with respect to these transactions) to be agents to the company, but to be persons within the act; yet by this act three fourths of the forfeitures are given to the company, and the other fourth to the informer; and the company having become informers are intitled to it: And it is so charged in the bill, that no information having been brought by any other person for the forfeitures, the company have preferred one in the Exchequer.

If that be so, we have three fourths by the act, and the other fourth as informers, and so may waive all the forfeitures. And then we are in the common case of a man that sues for tithes, he may waive the forfeiture, and bring a bill for a discovery. So a man may waive the penalties in the statute and have a discovery what timber has been cut. We therefore apprehend, that as to the outward bound voyage we have a right to call them to an account; and if so, they must answer a great part of our case, which is all the transactions relating to this fraud, from the time of their entering into our service, till their return. And yet the plea is general, and covers the whole, as well the outward as the home bound voyage.

The home voyage falls under another consideration. For the statute 6 *Annae* taking notice, that there had been great frauds in breaking bulk, it provides that those who offend in that manner

shall forfeit the ship and goods; one moiety to the informer, and the other moiety to the crown. And that stands upon the point of the covenant that has been spoken to, whether a man may not agree, that he will not commit a fraud.

As to the case of a mortgage, it is in its own nature redeemable, and a covenant contrary to the nature of it shall not be allowed. But may not a man covenant that he will not disturb a purchaser? This covenant is only to prevent a fraud, and detect it if committed.

And this agreement is upon a good consideration, for it is the foundation upon which the defendant is let into so considerable a profit. The consideration of the covenant is, that the company allows them those profits mentioned in the bill; so that it is both a lawful covenant, and for a valuable consideration.

Then it is a covenant that goes along with a trust, which no man would put in another, without a power to come to the knowledge how it is discharged; for these dealings lie in the knowledge of the defendants only, and cannot come to the knowledge of the company, without a discovery from the defendants. It is a trust to be executed on board a ship, and at sea; and therefore necessary to be guarded by some reasonable provision. It is not like a covenant to have interest upon interest, for a man has a recompence by simple interest. And interest upon interest is what the law will not allow of. But this covenant does not hinder any man of his right, but only prevents a fraud.

It is said a man has a right to plead, but may not a man renounce that right? He may in the case of tithes, and may not a man renounce part of his defence? May not I take a covenant, that a man shall give a judgment by default, and release of errors? And may I not come into a court of equity and compel a performance of that covenant? In the case of a covenant to suffer a common recovery, will not the court decree a performance?

It is true, that in ordinary cases a man has liberty to plead, where he may be subjected to penalties. But then a man may waive it. And it is agreeable to the known maxims, *volenti non fit injuria*, and *consensus tollit errorem*. If a man will waive any particular manner of defending himself, why may he not?

The case is no more than this; I have made an agreement whereby I am to be honest, but I will also have an opportunity to get more than I ought. I have made a contract that is not convenient

nient for me to perform, it is fit for me to have the profit allowed me by the company, but for me to perform my part of the covenant is no ways convenient. That is to say, I have played the knave, and therefore it is not convenient for me to perform this covenant, by discovering in what manner.

The question therefore is, which of the parties shall suffer. Shall the company suffer, who have performed their covenant? Shall they be stript, and the defendant go off with the profit? or shall the defendant suffer (if he calls it so) for his own misbehaviour, if he has misbehaved himself? I apprehend, that to take from us the means of coming at a satisfaction, is to take away the satisfaction itself. He that disseises me of the water that should come to my mill, disseises me of my mill.

The covenant is, that they shall not trade, and if they do, the company shall have so much *per ton*, and so much damages, which comes to 90 *l. per cent.* and this is said to be an extravagant recompence. Now they say, they have made 200 *l. per cent.* profit for the company; and if so, no doubt but they have made as good profit for themselves; and all the company is to have is but 90 *l. per cent.* and they carry off the rest.

They say we may take our remedy at law. But the very covenant is, that we shall have a satisfaction in this court. If we were to go to law, how could we recover there? How could we prove what goods they carried out? Let us but have a discovery of that here, and the measure of the damages is already settled between us. And this is the very point that was in view, when the covenant was made; that if they carried out any such goods, they should make such a recompence as was agreed upon. And nothing has happened since the covenant, to alter the nature of it, as some times it falls out.

It is very considerable, that this thing should be settled between us; for if this plea should stand, it may be the overthrowing the act of Parliament and the company too. As for what they say, that it is a new thing; it is quite otherwise, it is the constant article they make with all their supercargoes.

Parker Lord Chancellor. As to the offer made by the bill, to waive penalties and forfeitures; though it is said that the company have informed in the court of Exchequer, yet they have not set forth the term wherein the information was made, nor the particulars for which the information was. But the defendant is to take their words, that there is such an information, without knowing where

where to go to the record. Where a man sets forth, he is intitled to penalties as informer, and waives them; he ought not only to say that he has informed, but to set it out, so that it may appear to the court, that he has done so. Like pleading a former suit depending, it must be pleaded so, that it may appear to the court, of what term it is, and that it is for the same cause.

There is another point, which I think the plea does not cover; for though the defendant is charged to be concerned in those facts, yet it is laid in the disjunctive, that the defendants *or* some of them: He might have said, that he did not know that any other of the defendants had done any of those things: and if they had done them, and he was to have a share with them; yet if they only did them, they only would be subject to the penalties.

As to the main point, this covenant is to be considered as relating to a matter which must in a great measure lie in the defendant's knowledge. Therefore it is impossible for the plaintiffs to hope for a satisfaction, if they cannot get a discovery. They may come to the knowledge of some things, but it is morally impossible they should come to know all, without a discovery of the defendant.

In the next place, if the defendant has been guilty of a fraud, it is a prejudice to the plaintiffs, and the defendant ought to make a recompence, by reason of that trust they put in him, and by means whereof he had the opportunity of doing that wrong. Therefore from the nature of the trust, and the difficulty for the plaintiffs to come at the knowledge of these transactions, it is reasonable they should have a discovery.

But if this covenant is against law, it must not take place. It is said it is against the nature of a covenant, to restrain a court of justice, and to strip a man of his defence.

I think it is not a covenant to restrain the court from doing justice, but to enable the court to do it. It is a covenant, that the truth of the case, and the whole case, shall be laid before the court. There is a great deal of difference in the nature of the defence, upon an answer, or upon a plea: The plea is not a defence to the justice of the cause, but to the inquiry; that the defendant may keep back part of the truth from the court. Therefore it is not like the case of a covenant not to bring a bill to redeem, for a mortgage is an estate made to a person on condition to be void on payment. If the money be not paid, the estate is absolute at law; but the business of a court of equity is, to let him in to redeem. A covenant to the contrary doth not alter the nature of the security; it still con-

tinues a security for money as it was before, and is in its own nature redeemable. Such a covenant is to restrain a court from doing what is right and equitable, and is therefore void.

What is the defence in this case? It is, that the defendant is not bound to discover what will subject him to a penalty. It is insisting, that the plaintiffs have no right to demand that discovery. It is a negative privilege, that is allowed by the law, that a man may if he please refuse to discover a matter that will subject him to penalties; it is only a privilege, not a natural right, for then he would shake that natural right whenever he thought fit to make such discovery. If a man will waive such a privilege, surely he may; it is not a thing prohibited by the law. But the reason why he is not obliged to discover, is a want of right in the other party to oblige him to it. But if he will make a discovery he may, nor is any rule of justice or natural right broke by it. Is it unjust, that the whole case should be laid before the court? If the party has not done any thing contrary to his duty, an answer can do him no harm; and why should not this court carry it so far, when there can be no prejudice, unless the party is a knave? And if he be one, shall a court of equity protect him? I am (says he) so fair in the matter, that I will give you a right to examine me. The sending them to law would be to no purpose, for the damages are to be measured by the goods carried out, and without a discovery there is no knowing the *quantum*. The plea must be over-ruled, and the defendants must answer.

The same decree was made in the case of the South-Sea company v. Burnstead, Mich. 1728. Which see in Abr. Eq. Cas. 78.

Dominus Rex *vers.* Inhabitantes Civitatis Norwici.

INformation for not repairing three publick bridges called *Harford* bridges, lying within the county of the city of *Norwich*, leading from the market-cross to *Ipswich*; and sets out that they are out of repair, and that it cannot be found that any person or body politick is bound by tenure or otherwise to repair them, and therefore the inhabitants of the county of the city are bound by the statute: notwithstanding which they have not repaired them, but suffer them to continue in decay.

The king by letters patents may enlarge the boundaries of a city. B. R. has concurrent jurisdiction with the sessions about repairing bridges.

Jacob Robins and *Samuel Fremoult*, two of the inhabitants of the city and county of the city, come in the name of all the inhabitants of the city, and plead Not guilty. Then the record takes notice by way of suggestion, that the question is between the citizens of *Norwich* and the inhabitants of the county of *Norfolk*, and they being interested, there can be no indifferent trial had there, and *Suffolk* be-

ing the next county, the *venire* is awarded thither : And at the trial the jury find this special verdict.

That the city of *Norwich* is an ancient city, and has been time out of mind a county of itself, distinct from the county of *Norfolk*. That the three bridges were at the time of making the statute 22 *H. 8. c. 5.* within the county of *Norfolk*, and not within the county of the city of *Norwich*. That *Philip* and *Mary*, 1 *April*, second of their reign, reciting the many inconveniencies which had happened by not knowing the true bounds and limits of the county of the city, severed such an extent of ground from the county of *Norfolk*, and annexed it to the city. That the three bridges are within the annexed boundaries, which are made to extend *usque ad Harford* bridge, which is the farthest of the three. That they are publick bridges, and no particular person bound to repair them. That they are out of repair : But whether the inhabitants of the county of the city are bound to repair them, is the doubt of the jury, upon which they pray the advice of the court. *Et si, &c.*

Reynolds Serjeant *pro rege* made three points. 1. Whether the king can make a county of a city, or enlarge the boundaries of a prescriptive city, and make the enlargements parcel of it. 2. Admitting he may, whether the enlarged part shall be considered as parcel of the old city, so as to charge them with repairing within the 22 *H. 8.* 3. Whether in this case the farthest bridge be within the bounds of the enlargements.

Popham 17.

1. As to the first question, there is no doubt, but that the king may enlarge the boundaries of any city. Most of the cities of *England* are instances of the execution of such a power, and it has been generally done by charter, which was esteemed sufficient, without an act of Parliament. This city of *Norwich* was so made at one time or other, for in *Bradley's Treatise of Cities and Boroughs* it is mentioned as a borough, and part of the county of *Norfolk*. *Henry* the seventh made *Chester* a county of itself, as appears by 4 *Inst.* 215. 4 *Co.* 33. a.

2. Taking it then, that the king can enlarge any city, the next question is, where the charge of repairing bridges within such enlargement lies. The statute lays no absolute charge, till the bridges are in decay; so that when the statute was made, though these bridges were within the county of *Norfolk*, yet as they were not in decay, the statute had no operation upon them, before they were annexed to the city of *Norwich*. If an hundred were to be made at this day, the statute of hue and cry would take place within it. So the prerogative of the king in collating to a benefice void by the
2
promo-

promotion of the incumbent to a bishoprick extends to a new created parish, as was resolved in Dr. *Birch's* case in *Shower*, where there are many instances of this nature.

3. The third point is, whether one of the bridges be within the annexed bounds; the words are *usque ad pontem de Harford ad exteriorem partem rivi*; and that will take it in. There is a great difference, where *usque ad* is used to terminate a way, and where it is only used as a mark or designation of any conspicuous place. *Calvin* in his *Lexicon Juridicum*, says *usque ad* is sometimes *inclusionis nota*.

It is objected, that the defendants having pleaded the general issue, could give nothing in evidence, but that the bridges are in repair; and therefore that the trial should have been in *Norfolk*. To this I answer, that generally it is so, as 2 *Lev.* 112. 1 *Sid.* 140. 1 *Keb.* 498. 1 *Mod.* 112. 3 *Keb.* 301. because *prima facie* the inhabitants are chargeable; and if they would discharge themselves, they must do it by special pleading, and not upon the general issue, for the charge on the inhabitants is a common law charge, 2 *Inst.* 701. 1 *Ven.* 256. But these defendants were not chargeable *de communi jure*, but the county of *Norfolk* was; so that they are not obliged to find out who ought to repair, as they are when *prima facie* the charge lies upon them. They might contest the right with the county of *Norfolk* upon the general issue (as indeed they did) and therefore it was proper to carry it into *Suffolk*, the next county. *Vaugh.* 303. 2 *Roll. Abr.* 576. *Cro. Eliz.* 664. *Godb.* 420. *Palm.* 100.

Raby contra. This information is grounded upon the statute, now the statute gives the jurisdiction to the sessions, and where a statute prescribes a particular method, that must be followed. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 144. 2 *Inst.* 702, 704.

2. The city and county of the city must be taken to be distinct; and if so, then the citizens only have appeared, for the appearance is *in nomine omnium inhabitantium civit' Norwic'*, and then the issue is not well joined.

3. It is a mis-trial, It should have been in *Norfolk*. That is the next county, and intirely disinterested; for the only question on this issue is, whether the bridges be in repair, for that only can be given in evidence on Not guilty. 1 *Ven.* 256. 1 *Mod.* 112. And on the record it appears not to be a trial in the next county; for the *venire* is awarded to *Suffolk* as the next county, *Norfolk* excepted,

cepted, and there the trial should have been. 1 *Inst.* 125, 155.
1 *Roll. Rep.* 28. *Dy.* 279. 2 *Roll. Abr.* 596, 597.

I agree, the king may annex land to a city or county in point of jurisdiction, but not in point of charge; for as to that it still continues parcel of the old county. *Usque ad* is exclusive of one of the bridges. As if I prescribe for common *usque ad Michaelmas-day*, I have no right of common upon *Michaelmas-day*.

Reynolds replied. The charge to repair is at common law, and upon that this information is founded. The statute gives a concurrent, but not an exclusive jurisdiction, for here are no negative words, nor is this a new offence made by the statute, and upon those grounds it is that the cases went. As to the fault in the appearance, which was designed as a trick, the inhabitants of the city and of the county of the city are all one, for they are commensurate. It is absurd to say the jurisdiction of the county shall be abridged in point of interest, and not in point of charge. The city has the land annexed to them, *et transit cum onere*.

C. J. They who are not chargeable of common right, may discharge themselves upon Not guilty: and if so, the trial was well in *Suffolk*. If they could only give reparation in evidence, then it ought to have been in *Norfolk*. There is no doubt but the information lies in this case; and as to the appearance, we may take them to be the same persons. It seems to me that the farthest bridge is included, for it extends *ad exteriorem partem rivi*. There is nothing in that notion about distinguishing between jurisdiction and charge, for certainly both must go together.

Eyre J. inclined, that the trial was right in *Suffolk*, upon the distinction taken by *Reynolds*. *Sed adjournatur* to be further argued. And at another day,

Reeve pro rege. First exception: That no information lies in *B. R.* because the 22 *H. 8.* gives the jurisdiction to four justices. *Cro. Jac.* 643. 2 *Roll. Rep.* 398. 4 *Mod.* 144. Answer. I agree those cases, for there the statute makes a new offence, and chalks out a particular method; but this was an offence at common law, and the statute does not give an exclusive, but only a concurrent jurisdiction. Here are no negative words, though if there were, it has been held that negative words shall not take away the jurisdiction of this court. 1 *Sid.* 359. 2 *Keb.* 340. 11 *Co.* 64.

Second exception. They say this cannot be taken to be an information at common law, because it lays, that the defendants *debent reparare virtute*, &c. and concludes *contra formam statuti*. Answer. Such a conclusion will not make it an information upon the statute; for nothing is here alleged, but what the common law said before; and so it has been resolved *Cro. El.* 148. *Cro. Car.* 340. 2 *Roll. Abr.* 82. pl. 6. If a statute should add circumstances to a common law offence, yet the indictment need not conclude *contra formam statuti*. 1 *Ven.* 13. 1 *Sid.* 409. 2 *Keb.* 479.

Third exception. The information is against the inhabitants of the county of the city, and the appearance for those of the city only. Answer. Throughout the whole record the inhabitants of the city and county of the city are taken notice of to be the same. The bounds of the city and county of the city are generally the same. 1 *Roll. Abr.* 803. pl. 6.

These are all the exceptions taken to the information and proceedings. I come now to the special verdict, upon which two points have been raised.

1. Whether these bridges are within the annexed boundaries, for the defendants say that *usque* being *terminus ad quem*, and *a terminus a quo*, all the bridges are excluded. There can be no dispute but that two of the bridges are included. The question turns upon the third, *usque ad pontem de Harford ad exteriorem partem rivi*: This *usque ad* is only used to shew the circumference, for the other words take in the river. Now if it be taken exclusively, then the whole breadth of the bridge all round must be excluded: Words have been taken inclusively according to the subject matter. 5 *Co.* 7, 4 *Inst.* 112. 103, 111. 6 *Co.* 62, 67. 1 *Ven.* 292. 3 *Keb.* 594. 3 *Leon.* 211. The bridges were only mentioned as notorious places.

2. They say here is a mistrial, for on Not guilty the defendants could give nothing in evidence, but that the bridges are in repair, and therefore the trial should have been in *Norfolk*. Answer. Defendants by not denying our suggestion, have admitted the question to be, whether the city or county ought to repair. The cases cited of the other side are only, that the person chargeable *de communi jure* shall not give evidence, that another is bound *ratione tenurae*, but that is not our case. If a parish be indicted for not repairing a highway, you must prove it to be a highway, that it lies within the parish, and that it is out of repair; and if there be a failure in either of these, the defendants must be acquitted. 9 *H.* 6. 62. *Bro. General issue* 52, 53, 94. 34 *H.* 6. 43. *Show.* 270.

Brantbwayte Serjeant *contra*. I shall speak only to the point of the mistrial, and upon the information.

As to the first: No admission of the parties can alter the law. It must appear to the court, that the question is of such a nature, as to draw the trial out of the proper county. 2 *Cro.* 597. *Hardr.* 311. Here the only question is, whether the city of *Norwich* is bound to repair, for they cannot throw it any where else, without special pleading. 3 *Keb.* 301. 1 *Mod.* 112. 3 *Keb.* 370. 2 *Roll. Abr.* 597. *pl.* 1.

Secondly, I agree the information would have laid as at common law, if that method had been pursued; but here they make it a statute offence, and therefore they ought to have pursued the statute remedy.

The whole court were unanimous for the King upon all the points, but the mistrial. As to which the C. J. *Powys* and *Eyre* were of opinion, it was well in *Suffolk*: For the question naturally arises, whether the bridges are in *Norfolk* or *Norwich*; and the result of that is, that either the one or the other is bound to repair; and Not guilty puts all in issue: There was no other way to make this appear upon record, but by suggestion; which not being denied, it is as well as if it had appeared by special pleading. And it shall not be in the power of the defendants, to disappoint the King of a proper trial, by their refusing to plead specially. *Forrescue J. contra*, thought the right ought not to be tried in this issue. *Et sic adjournatur*.

The general issue goes to the situation as well as repair of bridges where the charge is of common right.

The cause came now to be spoke to upon the single point of the mistrial.

Cheshyre Serjeant *pro rege*. The defendants in this case might put us to prove, in what county these bridges lie; and then the right of repair is a consequence, wherefore the trial is right in *Suffolk*. They could not safely plead the special matter, because it will amount to the general issue, and so be demurrable. 34 *H.* 6. 28, 43. *Bro. issue* 53. 18 *H.* 6. 21. *Fitzh. action sur stat.* 4, 19 *H.* 8. 9. 2 *Roll. Abr.* 683. The defendants might have proved these to be private bridges on Not guilty. 1 *Ven.* 256. The resolution of the case of the *King v. Inhab. Hornsey* was contrary to the opinion of *Holt C. J.* in *Show.* 270. for *Eyre*, *Dolbin* and *Gregory* denied the distinction, though the reporter takes no notice of it. *Mich.* 8 *W.* 3. *Rex v. Inhab. Ireton*. The reason of this suggestion was to prevent delay, and is therefore to be favoured, since

since it hinders the defendant from challenging. If he confesses (as he has done here) the truth of the suggestion; then he is estopped: If he denies it, that denial is entered of record, and after that he shall never come and allege that matter as a fault. There is no other way to come at the truth of this fact, but by putting him to confess or deny it, for it is not a matter issuable, *Tri. per pais* 140. *Plow.* 74. b. 10 *H.* 6. 54. 14 *H.* 6. 2. *Nient dedire* amounts to a confession, though it does not go on, *fore verum concedit*, as some of the entries are: This confession is as much an estoppel, as in *Salk.* 310. where an executor suffered judgment by default, and then was estopped to say he had no assets.

Pengelly Serjeant *contra*. The matter of this suggestion does not warrant the award of the *venire* into *Suffolk*. It is not averred the county of *Norfolk* is concerned, but only by way of conclusion, *ideoque*, which is not supported by the premises. I agree the situation might have been contested at the trial. The court might have refused this suggestion, as was done in *Delme's* case. So 2 *Roll. Abr.* 597. pl. 1. If the jury had come out of *Norfolk*, we could not have challenged the array. *Hard.* 311. Case for disturbing the plaintiff in taking the profits of a Judge of the sheriff's court in *London*: On Not guilty, it was suggested, that the office was grantable by the mayor and aldermen, and prayed the *venire* to the next county. But *Hale* C. J. refused to award it, because it did not appear by necessary collection from the record, that the title of the mayor and aldermen to fill up this place would come in question. Though the situation may come in question, yet that does not determine the right; for the defendants will be acquitted without trying the right, so that is not a matter within the extent of this suggestion. Besides, this is of a matter of law, whereas suggestions should be of matters of fact only. *Co. Ent.* 59, 60. 2 *Roll. Abr.* 597. pl. 8. 1 *Ven.* 58, 90. *Quo warranto* 28. *Nient dedire* alone is not a confession. *Cro. Jac.* 547. *Dy.* 367. pl. 40.

C. J. Since it is admitted, the situation may come in question; that will by way of consequence determine the other point, who ought to repair; and therefore the trial could not be in *Norfolk*. I take *nient dedire* to be as much a confession, as *cognovit actionem*. The matter of law in the suggestion arises necessarily out of the matter of fact, and without it, would not be compleat. To which *Powys* J. agreed. *Et per Eyre* J. On Not guilty, the defendant may controvert every thing the prosecutor is bound to prove. He is bound to prove, where the bridges lie, and therefore *Norfolk* was an improper county. If a man would discharge himself upon a particular account, he must plead it specially; but not where
the

the common right is his defence. If a man is charged to repair *ratione tenurae*, he may throw it upon the parish by the general issue. The same suggestion was made in Sir *Richard Onslow's* case, and no exception taken. There is judgment entered in that case of *Hornsey, Pas. 2 W. & M. rot. 31.* and in the debate, as I find in my notes, *Holt C. J.* said, the defendants might shew it not to be a highway.

Fortescue J. thought, parcel or not parcel, could not be given in evidence on Not guilty: For *1 Mod. 112.* *Hale C. J.* said, Not guilty goes only to the repair or not; so that as to all other questions the defendant must plead specially. And *Parker C. J.* held so, *Mich. 10 Ann.* There being three Judges to one, *Judicium pro rege.*

Trinity

Trinity Term

5 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Nicholas Lechmere, Esquire, Attorney General.

Sir William Thompson, Knt. Solicitor General.

Dominus Rex vers. Nixon.

THE court refused to quash an information upon motion, which had been exhibited by rule of court: *Eyre J.* observing, that such informations are amendable. 1 *Sid.* 152, 54. Information not to be quashed on motion. And held so by

Holt C. J. *Hil.* 8 *W.* 3. *Rex v. Gregory*; and he affirmed, the information in *Fountain's* case, 1 *Sid.* 152. was denied to be quashed.

Dominus Rex vers. Jones.

THE defendant having treated the process of the court contemptuously, an attachment went against him, without a rule to shew cause, (according to *Salk.* 84.) and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the court sent for the sheriff of *Middlesex* into court, and ordered him to take a sufficient force. Attachment absolute on first motion, and sheriff ordered to take posse.

VOL. I.

B b b

Between

Between the Parishes of New Windsor *and* White Waltham.

Certificate
concludes the
parish that
gives it as to
all facts there-
in mentioned.

JOHN Pissey, being legally settled in the parish of *White Waltham*, where he had lived two years with a woman who was reputed his wife, went with a certificate from *White Waltham*, owning them as man and wife, into the parish of *New Windsor*, where they had six children. Then the man dies, and the woman swearing they had never been married, the justices adjudge the children to be bastards, and settled in *New Windsor* where they were born.

Reeve moved to quash the order, because the evidence of the mother ought not to be admitted, and because the certificate was conclusive to the parish of *White Waltham*, to say they were not man and wife. For as no parish can refuse a certificate-man, therefore whatever is the import of that certificate must be binding, else it would be hard to get rid of such people.

Yorke contra. It is a rule, that bastards are settled where born; and I believe it will not be pretended, that the bastard of a certificate-man can be sent back with him. But the only question will be, whether the legitimacy of the marriage could come in question at the sessions. As to the exception about the mother's evidence, I take it not to be material in this court, what evidence the sessions went upon. If the justices give an insufficient reason for their adjudication, yet that is no ground to quash the order. Their adjudication, that such a place is the place of the last legal settlement, is conclusive to this court, though they shew in the face of the order an act which in law will not gain a settlement; for they, and they only, are judges of the fact, and this court only declares the law arising from that fact. If a jury finds not only the fact, but the evidence of it; yet you put the evidence out of the case, without determining whether it be sufficient or not, and adjudge upon the fact only. The mother's evidence is good, for she is a stranger *quoad* the parish. *Salk.* 478.

As to the certificate, that cannot enure by estoppel as a deed. The sessions are *quasi* a jury, and not bound by estoppels. 4 Co. 53. b. *Salk.* 276. *Adjournatur*; and the last day of the term the Chief Justice delivered the opinion of the court.

C. J. We are all of opinion, that the certificate is conclusive to the parish of *White Waltham*, and they are not to be admitted to dispute the validity of the marriage, and therefore the six children, being actually chargeable to *New Windsor*, must be sent back to
White

White Waltham. There is no doubt but the bastard of a certificate-man is settled in the place of his birth, for he is not such an issue as will follow the settlement of his father or mother, neither is he *his* or *her* child within the intention of the statute, so as to be sent back with the parent.

Bastard of a certificate-man settled where born. Salk. 535. Post. Trin. 15 Geo. 2.

Dominus Rex vers. Corrock.

INDICTMENT for not repairing a highway, which the defendant was obliged to do *ratione tenurae* of a certain house, which in another place is mentioned to be the mansion-house of the defendant.

Sufficient to charge a man to repair, *ratione tenurae*, without *suae*.

Yorke objected, that by 5 H. 7. 3. it appears that the occupier and not the owner is chargeable to repairs of the highway, and therefore the indictment should have been *ratione tenurae suae*, for it may be this house is let to another, and cited *Noy* 93. *Lat.* 206.

Et per curiam, (upon consideration) There is no necessity to lay it so, for *ratione tenurae* implies it to be such a tenure, as makes him chargeable. And so it was held 1 *Ven.* 331. *Rex v. Fanshaw*, which is entered *Mich.* 29 *Car.* 2. *rot.* 12. There he was charged *ratione tenurae quorundam terrarum et tenementorum*, and the exception was taken, for want of *suorum*, and the indictment held well enough. But if it were necessary to say *suae*, we think it is implicitly averred, by calling it afterwards his mansion-house; so *quacunque via data*, the indictment is well enough.

Argyle vers. Hunt.

LIBEL in the spiritual court for the word *whore*, which upon the face of the libel appeared to have been spoken in *London*, and after sentence *Corbet* moved for a prohibition, because the defect of jurisdiction appeared in the libel itself, and the court will judicially take notice of the custom of *London*, where an action lies for the word *whore*. *Show.* 301, 331. 1 *Roll. Abr.* 550. 2 *Roll. Abr.* 69. 1 *Lev.* 116. *Sty.* 69. 1 *Inst.* 96. b. *Ketelbey contra*. It is now too late, and it should have been pleaded below. *Lutw.* 1023. *Et per curiam*, The rule is, that you shall never allege matter *dehors* the libel as a ground for a prohibition after sentence, but the foundation of our granting it must arise out of the libel itself in defect of jurisdiction. And if there be a defect of jurisdiction appearing in the libel, then the party never comes too late, for the sentence and all other proceedings are a mere nullity. But where the

No prohibition after sentence, though word *whore* appears to be spoke in *London*.

the spiritual court has an original jurisdiction, which is to be taken from them upon account of some matter arising in the suit, as for defect of trial; there after sentence the party shall never have a prohibition, because he himself has acquiesced in their manner of trial, which is a waiver of the benefit of a common law trial. It is true, these words appear to be spoke in *London*, but how does the custom of *London* appear to us? There is nothing of that in the libel, and though we have such a private knowledge of it, that upon motion we do not put the party to produce an affidavit, because the other side never disputes it; yet we cannot judicially take notice of it, and if any body will insist on an affidavit, we must have it in every case. It was never known, that the court judicially takes notice of private customs, but they are always specially returned. *Mich. 9 Ann. Stone v. Fowler.* There was a prescription for the parishioners to repair the fences of the church-yard, and after sentence they came and suggested, that the rector was bound to those repairs, and that the spiritual court, in as much as the prescription was not admitted, had no power to proceed; but the court held they came too late after sentence. A prohibition was denied.

Bellew *vers.* Aylmer.

In *scire facias*
against execu-
tor, no costs.

What judg-
ment may be
reversed in
toto, and what
in part only.

IN a *scire facias* against an executor, execution was awarded, and then the record went on with a *consideratum est etiam*, that the plaintiff should have costs. It was admitted, that the 8 & 9 *W. 3. c. 10.* which gives costs on a *scire facias*, does not extend to executors, and therefore the judgment for costs was erroneous. But then it came to be the question, whether the court should reverse the whole judgment, or only *quoad* the costs. And *Fazakerley* for the executor insisted to have it reversed *in toto*, for that it was one intire judgment, on which they could not have several executions. *Cro. El. 162.* There were damages given to the crown in a *quare impedit*, and the judgment reversed *in toto*. So is 1 *Leon. 149.* *Allen 74.* If one defendant dies, and judgment is against all; it must be intirely reversed. 1 *Roll. Abr. 775. pl. 2.* 2 *Keb. 696.* 1 *Roll. Abr. 775. pl. 4.* 1 *Ven. 27, 39.* *Cro. Car. 471.* *Salk. 24.*

Reeve contra. If the record had stopped at the awarding of execution, no doubt but all would have been well enough. And then when it goes on with a *consideratum est etiam*, that is a distinct independent judgment, and may be reversed without affecting the other. If part of the words laid are not actionable, and several damages are given, judgment shall be reversed in part only. *Hob. 6.* (*sed vide Salk. 24.* that case denied for law.) 2 *Cro. 343.* *Moor 708.*

708. *Cro. El.* 538. I agree the case in *Hob.* is denied in 2 *Cro.* 424. But the reason on which it was denied doth not impeach the authority of it as to my present purpose in this case, where there are two different judgments. 1 *Roll. Abr.* 776. *pl.* 7. 5 *Co.* 58. As to the case *Salk.* 24. my report differs from it, for I took the damages to be several, but he reports them to be entire.

Per Curiam: *Consideratum est etiam* does not disjoin it at all. If ^{2 Saund. 257.}
a man declares for two ten pounds, it is the same thing whether the ^{1 Sid. 357.}
judgment be entire for 20 *l.* or several, for each 10 *l.* *Adjournatur.*

And *Hil.* 7 *Geo.* without farther argument it was reversed as to costs, and affirmed *pro residuo*, on the authority of *Green v. Waller*, *Lill. Ent.*
Hil. 13 *W.* 3. *rot.* 20. and adjudged in *B. R. Trin.* 2 *Ann.* on error ^{233.}
out of *Ireland*: It was reversed as to costs, and affirmed as to the rest.

Dominus Rex vers. *Inhabitantes de South-Marston.*

THE order run, "Whereas *J. Charlwood* and his wife *is* In orders of
"come into your parish endeavouring to settle *themselves* removal it is
"contrary to law, and *are* likely to become chargeable: These are not necessary
"therefore to require you, to convey the said *Charlwood* and his to say, the
"wife *from your* said parish to the parish of *A.* &c." party is come
into the parish.

Martin moved to quash the order, for the incertainty whether the husband or wife came into the parish, it being in the singular, when it should have been in the plural number; and cited *Salk.* 122. where an order of two justices was *doth*, and quashed. *Trin.* 11 *Ann.* *Regina v. Ingham*, *insultum fecit* against two defendants, and held ill. 2 *Keb.* 51.

Hussey contra. The singular number will serve for husband and wife, though for no others. The case of an indictment will not govern this, for that is always construed strictly, but these have a liberal construction. Nor is the case in *Salkeld* at all applicable, for there the fault was in the adjudication itself, but here it is only in the complaint. I see no more necessity to shew them in the parish, than there is to say did not take 10 *l.* *per annum*, or serve a parish office which is never required. But if it be necessary, it appears sufficiently upon the whole order. It is said, endeavouring to settle *themselves*, and that they *are* likely to become chargeable, and then they are ordered to be removed *from* the parish. *Et per Pratt*, C. J. I do not think it necessary to shew they came in, but only an endeavour to settle; for that may be where the party never came in, as the case

Complaint
may be taken
by implica-
tion, but not
the adjudica-
tion.

of children born in one parish, when the settlement of the parent is in another. But if it were necessary, it is implicitly set forth, which in the complaint is sufficient. To which *Powys* and *Eyre* Justices agreed. *Et per Fortescue J.* The only two things requisite for the justices to adjudge, is the place of the last legal settlement, and that the party is likely to become chargeable. And these must be positive, though as to the complaint it is well enough to take it by implication. This is not false grammar, as *doth* was in *West's* case, for it is common for *Latin* authors to put the singular number, where there are two nominative cases. *Horace* says *Detur nobis locus, hora*. If it were necessary to strain a point, we might refer it to the husband, and then the wife will follow of course. The order was confirmed.

Dominus Rex *vers.* Munden.

Man not
bound to
maintain his
wife's mother.

ORDER, reciting that *Munden* had a good fortune with his wife, and that her mother was poor, therefore he is ordered to provide for her. And in maintenance of the order 1 *Bulst.* — and 2 *Bulst.* 345. *Styles* 283. were cited. *Et per Pratt, C. J.* On consideration, we are all of opinion, that the son-in-law is not bound, either within the words or intent of the statute, which provides only for natural parents. By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by act of Parliament, and that can be extended no farther than the law of nature went before, and the law of nature does not reach to this case. As to the case in 1 *Bulst.* it is plain the word *not* was left out only by mistake, for the sense of the clause leads you to read it *not obliged*, and besides the judges were divided. The case indeed in 2 *Bulst.* is an authority in point as far as it will go, but that is no judicial authority, only a case at a judge's chamber. The same was also said *abiter* in the case of *The Queen v. Fane, Pasch. 10 Ann.* but it never came judicially before the whole court till now. And therefore as it is *res integra*, we are of opinion the order must be quashed.

Dominus Rex *vers.* Gill & al'.

Man not cri-
minally an-
swerable for
a casual da-
mage done to
another.

INDICTMENT for throwing down skins into a man's yard, which was a publick way, *per quod* another man's eye was beat out. On the evidence it appeared, the wind took the skin, and blew it out of the way, and so the damage happened. The Chief Justice remembered the case of the hoy (*ante* 128.) and that in *Hob.* 134. where

where in exercising, one soldier wounded another, and a case in the year book, of a man lopping a tree, where the bough was blown at a distance and killed a man. And in the principal case the defendants were acquitted.

The Attorney General *vers.* Elliston et al'. In Scaccario.

SCIRE *facias* on a bond conditioned to transport coffee, and not reland it. The defendant as to part pleaded the statute of equity of Hen. 8. That he did not transport the coffee, because when it was in the ship, one of the officers of the customs came on board and seized the coffee, and carried it back to London: That when it was cleared, he continued the voyage, till he met with a tempest, in which both ship and coffee were lost. And as to the residue of the coffee, he pleaded it was never relanded. The attorney general replies, that the seizure was, because the coffee was unshipped with an intent to be relanded; and on a traverse of this they are at issue, and it is found with the king.

If the plea contains matter of excuse, it is enough for the plaintiff in all cases, but that of an award, to falsify the excuse. 33 H. 8. c. 39. §. 31.

It was moved in arrest of judgment, that here was an immaterial issue, for the bond being only not to reland, the replication only discloses evidence of an intent to reland, which is not sufficient to subject him to the penalty. On the other side it was said, that the plea had admitted a non-performance, by offering an excuse; and then it was sufficient to meet the plea, and falsify the excuse, in all cases (that of an award only excepted) for there indeed, if the defendant pleads *nul agard fait*, the plaintiff must not only shew an award, but he must go farther and assign a breach. *Salk.* 138. But in no other case is he obliged to do more, than falsify the defendant's plea. And of this opinion was the court, and judgment was given for the plaintiff.

Windmil *vers.* Cutting.

PER *Curiam*: An attorney of C. B. who is actually in the custody of the marshal of this court, shall never be suffered to plead his privilege. 2 *Roll. Abr.* 232. For there is a great difference between an actual, and supposed custody. 1 *Salk.* 1. *Et per Fortescue J.* As to the plea that a man is a clerk of one of the prothonotaries of C. B. I have looked a little into it, and find the old way of pleading was, that they were employed in ingrossing of records, *affidentes in curia*, and the like. *Rast.* 473. b. 34 H. 6. 15. And so in this court of late years an affidavit has been required to that effect, *Cooke v. Latimer*, *Read v. Chambers*, and the case of one *Worthington*

Privilege del C. B. where pleadable.

Worthington 11 Ann. In the case of *Baker v. Swindon*, Mich. 10 W. 3. in C. B. rot. 360. a clerk pleaded, that he ought to be sued by bill, and not by original, but the court held the contrary, and that attornies only have that privilege.

Clift 572.

Anderson *vers.* Buckton.

Where the plaintiff shall have full costs though the damages are under 40 s.

TRESPASS for the entry of diseased cattle into the plaintiff's close, *per quod* the plaintiff's cattle were infected. Not guilty pleaded, and a verdict for the plaintiff for 20 s.

It was moved, to allow the plaintiff his full costs, upon the account of the special damages alleged and put in issue, and which would have subsisted of itself as a distinct cause of action, and the plaintiff ought not to be punished for joining it with the trespass, to avoid vexation. And *Cro. Car.* 163, 307. 3 *Mod.* 39. 2 *Ven.* 48. *Cro. Car.* 141. *Ray.* 487. were cited.

On the other side it was insisted, that though here is matter of aggravation laid, yet it is still to be considered as an action of trespass, in which there is a recovery under 40 s. And matter alleged only by way of aggravation cannot intitle the plaintiff to full costs. 2 *Ven.* 48. *Salk.* 642.

The Chief Justice, *Powys* and *Fortescue* Justices, were for full costs, because the consequential damage is a matter for which the plaintiff might have had a distinct satisfaction. And they likened it to the case of an action of battery, *per quod consortium* of the wife, or *servitium* of the servant *amissit*, which for that reason are not within the statute. The true distinction is, where the matter alleged by way of aggravation will intitle the party to a distinct satisfaction. Asportation of trees may be a ground for a trover, but yet may be laid as an aggravation in trespass, and the plaintiff shall have full costs. If a man enters and chases and kills my cattle, that is a distinct wrong, but yet may be joined as matter of aggravation. Suppose I have two closes at a great distance, and the same water-course running through both, I may allege the entry into one, *per quod* the water was prevented from coming to the other, and there shall be full costs.

Eyre J. contra, Because this recovery will not be pleadable to a special action upon the case for the special injury, *quod caeteri negaverunt*. And the plaintiff had full costs.

Dominus

Dominus Rex *vers.* Kinnerfley and Moore.

INformation, setting forth, that the defendants *Kinnerfley* and *Moore*, being evil disposed persons, in order to extort money from my Lord *Sunderland*, did conspire together to charge my Lord with endeavouring to commit sodomy with the said *Moore*; and that in execution of this conspiracy they did in the presence and hearing of several persons falsly and maliciously accuse my Lord, that he *conatus fuit rem veneream habere* with the defendant *Moore*, and so to commit sodomy. The defendant *Kinnerfley* only appears, and pleads to issue, and is found guilty, and now several exceptions were taken in arrest of judgment.

Conspiracy may be laid without any overt act, and if one be convicted, judgment shall be given against him before the trial of the other.

Brantwayte Serjeant. The nature of the offence must appear upon the record, for by that only the court must judge, and the offence must be particularly and certainly alleged. *Conatus fuit* is uncertain, for it might only be an act of the mind, which before it was put in execution was suppressed by reason. 1 *Roll. Rep.* 79. 2 *Bulst.* 276. In an action for words, *per quod maritadium amisit*, the plaintiff declared, that whereas he *intendebat et conatus fuit* to marry such a woman, the plaintiff spoke of him such words, *per quod*, &c. and this was held to be uncertain, and the judgment was arrested.

2. It should appear upon the record, that the party accused is innocent; for it is no crime to charge a guilty person with such an offence. They should have averred, *ubi revera et in facto* he *non conatus fuit* to do the act with which he was charged. *Hut.* 11, 49. In actions for a malicious prosecution the plaintiff must shew the former action to be determined, and how; so likewise he must shew an acquittal upon an indictment. 1 *Keb.* 881.

3. To every conspiracy there must be two persons at least, whereas here is only one brought in and found guilty. If hereafter the other should be found Not guilty, that will consequently be an acquittal of *Kinnerfley*. If three be indicted for a riot and an assault, and one only found guilty, and the others acquitted; this discharges them all, because the riot is the foundation, and the assault only the consequence. *Salk.* 593. And one person alone cannot be guilty of committing a riot: So in this case one cannot be guilty of the conspiracy, though he may of the overt act, and yet the foundation (which is the conspiracy) being removed, the other part, which is only the consequence, falls of course.

Plow. 111. b. *Poph.* 202.

Comyns. Bare words are not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution. 4 Co. 16. a. 1 Roll. Abr. 110. p. 6. 9 Co. 56. b. For if there be only words, an action of *scandalum magnatum* lies. If the charge on my Lord was by course of law, then the defendants are justified, till it is falsified in a legal manner, either by *ignoramus* or acquittal. 1 Roll. Abr. 113, 114. R. 2. And the court will not suffer the party accused to bring his action, till he has manifested his innocence; because otherwise there might be contradictory judgments, for the parties might be condemned in an action for that prosecution, which they might afterwards establish, and then those two judgments would be inconsistent. 3 Keb. 799.

Hob. 267.
Salk. 13.

The offence with which my Lord is charged is no crime punishable by our Law. For a bare endeavour (which is the most that is alleged) to do such an act, is not punishable in the temporal courts. And the only reason why it is actionable, to say of a woman that she had a bastard is, because she is punishable for it by 18 Eliz. c. 3. and 7 Jac. 1. c. 4. Poph. 36. nor is it actionable then, unless it appears the parish was charged. Salk. 694. So to say she keeps a bawdy-house, because the common law punishes such a person. Cro. Car. 329. And yet it is not actionable to call a woman a bawd, which is only an offence cognizable in the spiritual court. 1 Ven. 53.

If Moore should die, be pardoned, or acquitted, how can the other be guilty of a conspiracy? Cro. El. 701. 1 Ven. 234. 3 Keb. 111. 1 Saund. 228. 2 Keb. 476. 1 Keb. 284. 1 Roll. Abr. 111. pl. 5.

Adjournatur; and at another day Reeve in answer to the objections argued:

1. As to the *conatus* being uncertain. This goes to their own charge; from which we could not vary, but were obliged to lay it as we could prove it. We could not lay, that he said my Lord did the act, when he only said he endeavoured to do it. The case in 1 Roll. Rep. 79. and 2 Bulst. 276. is not applicable to this. There it was in the plaintiff's power to have been more particular, and the words were not actionable without a special damage: He should have shewn a treaty and communication between himself and the lady, whereas he only says he intended and went about to marry her, and it does not so much as appear she knew any thing of the matter. In many cases it is actionable to charge a man with a bare attempt to do an unlawful act. Cro. El. 6. You lay in wait

wait *intending* to murder *A.* you laid gunpowder under my window *minding* to burn my house. *Cro. El.* 191. You agreed to hire a man to kill me. *2 Lev.* 205. *1 Ven.* 323. In actions for words the plaintiff may make his own case, but we were obliged to follow the defendant, and lay the overt act as it was. If an indictment be imperfect, yet if it be recited in an action as it is, it will be sufficient. *47 E.* 3. 16, 17.

2. They object, here is no overt act. Is not the affirmation one? Surely it is. But if it be not, yet we insist there was no occasion to lay any. The conspiracy is the *git* of the charge, and the other only matter of aggravation, of which the defendant may be acquitted, and found guilty of the conspiracy notwithstanding. *1 Ven.* 304. *1 Sid.* 174. *1 Lev.* 125. So *1 Lev.* 62. *1 Keb.* 203, 254. A conspiracy to charge a man with being the father of a bastard child was held well laid, without any overt act. *27 Aff. pl.* 44. *16 Aff. pl.* 62. There were differences in opinion as to this matter formerly, but now the law is settled.

3. Say they, no judgment shall be given against *Kinnerfley*, because possibly *Moore* may be acquitted, and that will be an acquittal of both. This is arguing from what has not happened, and probably never will; for though *Moore* may have an opportunity to acquit himself, and is not concluded by the verdict as *Kinnerfley* is; yet as the matter now stands *Moore* himself is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one before the trial of the other. As *4 E.* 3. 34. *b.* *Bro. Conspiracy* 21. *1 Ven.* 234. *3 Keb.* 111. *24 E.* 3. 73. *a.* *Pasf.* 7 *Ann. B. R. Regina v. Herne*. There the indictment was that he *with A. et multis aliis* did conspire to accuse *B.* that he *did attempt* to commit sodomy. The grand jury found the bill as to *Herne*, with an *ignoramus* as to *A.* *Herne* was convicted, and then it was moved in arrest of judgment, that there being an *ignoramus* as to *A.* *Herne* could not be guilty of conspiring with him. But the whole court over-ruled the exception, and said it was sufficient, being found that he *cum multis aliis* did conspire, and that it might have been laid so at first; and *Herne* was fined forty marks, and set in the pillory. My Lord C. J. of the Common Pleas, that now is, was of counsel in that case; and he quoted a case where several were indicted for a riot, *cum multis aliis*, two only were found guilty; and it was objected, that there must be three to make a riot; but upon the *cum multis aliis* judgment was given against the defendants.

4. Another exception is, that we have not averred my Lord was innocent of the fact charged upon him. It is expressly laid, that
the

the defendants did *falsly* charge, which could not be, if the accusation was true. *Trin. 4 Ann. Regina v. Best, Salk. 174, 376.* indictment setting forth, that the defendants *falso conspiraverunt* to charge *A.* with being the father of a bastard child: On demurrer the exception was, that there was no averment, that *A.* was not the father; and upon great consideration and search of precedents, the indictment was held good. A difference was taken in an indictment for perjury, where you must aver the oath false; and also in actions for a malicious prosecution, where it must appear the party was innocent, to intitle him to damages. *F. N. B. 114, 115. Raft. 117.*

5. The last exception is, that the offence charged is not punishable in the temporal courts. We deny that. Attempts of this nature have been punished, and so have conspiracies to do a lawful act, which is stronger than this case.

The whole court were unanimous in over-ruling all the exceptions. And *Powys J.* quoted a case in *Godb.* where a man was punished for an attempt to pick a pocket. And *Eyre J.* remembered Captain *Rigby*, who was pilloried for an attempt to commit sodomy. And he quoted *Trin. 11 W. 3. Rex v. Sudbury & al'*, where four were indicted for a riot, two found guilty, and the other two acquitted; and this was held to be a discharge of them all, though it had been otherwise if it had been laid *cum multis aliis*. And *Hil. 2 Ann. rot. 17.* is a case to the same purpose as the *Queen and Best. Et per Fortescue J. falsis allegantiis* is in the commission of oyer and terminer. And *Holt C. J.* held in *Best's* case, that an attempt to do an act cognizable in the spiritual court was punishable here. *In foro conscientiae* the attempt is equal with the execution of it, and there is a great difference between being found Not guilty, and not being found guilty.

Whereupon judgment was given for the King, and afterwards the court proceeded to sentence, and told the defendant, nothing but his being a clergyman protected him from a corporal punishment. They fined him 500 *l.* a year's imprisonment, and to find sureties for his good behaviour for seven years.

In *Easter* term, 5 *Geo.* *Moore* was convicted and sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties for seven years.

One in execution is not to have the benefit of the rules.

And this term *Kinnerley*, on affidavits of his being indisposed, moved the court that he might be admitted to the benefit of the rules. *Sed per curiam*, We never do it for one in execution, which differs

differs from the case of persons committed for high treason, who have been bailed on account of illness.

Wright *vers.* Kitchingman.

ERROR *e* C. B. of an award of execution in a *scire facias* upon recognizance of bail, reciting that the defendants in *Hilary* term 3 Geo. *coram Justitiariis de C. B. manuceperunt et uterque eorum manucepit pro Richardo Welbourn in 106 l.* Upon condition, that if he should happen to be condemned in a certain plea of debt upon demand for 53 *l.* at the suit of *Kitchingman* and his wife, then the said *Welbourn* should pay and satisfy the said 53 *l.* and all damages, or render his body in execution of that judgment. And then the *scire facias* sets forth, that *licet* the said *Kitchingman* and his wife recovered the said 53 *l.* debt and 15 *l.* for damages, yet the said *Welbourn* never rendered his body in execution of the said judgment, or satisfied the said debt and damages. Upon a *scire feci* returned, there is judgment by default, and execution awarded. The defendants assign for error, that the plaintiffs in *Hil.* 3 Geo. *optulerunt se* against the said *Welbourn de placito transgressionis acetiam in quodam placito debiti supra demand' 53 l.* upon which process issued against him, returnable *in octabis purificationis*: at which day the defendants entered into recognizance for his paying the debt or rendering his body: And that the plaintiffs did not within two terms, according to the course of the court, declare against the said *Welbourn in placito praed'*, whereby the recognizance was discharged: But farther they say, that the plaintiffs in *Trinity* term following caused him to be summoned into the said court to answer them in a plea of debt for 53 *l.* and obtained judgment thereupon, and that such judgment was had upon those proceedings, and not in that action wherein the defendants became bail; but notwithstanding this, the award of execution is grounded upon the judgment in that collateral action. The other errors assigned are, that the Justices of C. B. had no power to take any recognizance in this form, and that there is a discontinuance, and several variances between the recognizance itself and the recital of it in the *scire facias*. The defendants verify their assignment of errors, by procuring the recognizance entered with a *placita* of *Hilary* term, and the other proceedings with a *placita* of *Trinity* term, to be sent up by *certiorari*, with a certificate that there are no continuances from *Hilary* to *Trinity* term. And *in nullo est errat'* pleaded.

Matter which lies properly in the mouth of the principal, or might have been pleaded to the *scire facias*, is not assignable for error after execution awarded. Salk. 262. 4 Mod. 306.

Strange pro quer' in errore. Before I enter into the debate of our exceptions, I must beg leave to observe, that as this record stands, the fact of our assignment of errors must be taken to be as we have

alleged it; for we have not only verified it by the return of the *cartio-rari* (which is the proper trial in these cases) but the other side have come into it, by pleading *in nullo est erratum*, which is a confession of the matter of fact, and serves to put the law arising from that fact in issue before the court: it is in effect to say, I agree the proceedings were in the manner you mention, but notwithstanding this, I insist they are regular; they are not erroneous. So is 1 *Ven.* 252. 1 *Sid.* 147.

I shall at present omit observing what those facts are, which stand admitted upon this record, but shall make use of that observation, as occasion shall require, in speaking distinctly to each exception.

Our exceptions are of two sorts. 1. Such as go to the form; and 2. To the foundation of this *scire facias*.

Those which respect the form are, either such as arise upon the face of the writ itself, or by comparison of it with the other parts of the record.

The exception I take to the writ itself is, that the breach is not well assigned, for they only say, that *licet* such recovery against the principal, yet he never rendered his body *in executione judicii prae-dicti*, which ties it up to a particular kind of render, and has not left it at large to any render which would be a good discharge of the recognizance. And therefore though I must admit, he did not render himself in execution of that judgment; yet if I can shew, that notwithstanding what the plaintiffs have alleged, the condition of this recognizance may have been performed; then I shall be well justified in saying, the breach is not well assigned.

A render may be either before or after judgment, and it may happen, that though either of these will discharge the bail, yet neither of them may be a render in execution of that judgment. It is plain, the first cannot: There cannot be a render in execution of a judgment, when as yet there is no judgment; but yet it will not be denied, but that a render before judgment is a good discharge of the bail, for the intent of the condition is answered, inasmuch as the party is forth coming, and the other may have his body as a satisfaction for the debt when recovered.

And as there may be a render before, so likewise after judgment, and yet not in execution of that judgment. For suppose the bail bring the principal into court, and leave him there, and the plaintiff refuses (as by law he may) to take him in execution; I believe no body will say this is a render in execution of that judgment,

judgment, and yet there is no doubt but this is a good discharge of the bail; for it amounts to a performance of the condition: And in this case the entry is not, that he was rendered *in executione judicii*, but *in exoneratione manucaptor*. And if the plaintiff will not pray him in execution, the consequence of that is, that he must be discharged. So is *Hob. 210. Walby v. Canning*.

Since therefore it appears, there are more ways than one to perform the condition of this recognizance, I need not cite many cases to prove, that the saying the principal did not render in one particular manner, will not amount to an averment that he did not render at all. If a man is bound to go to *York* or *Lancaster* by such a time (where according to Sir *Rowland Heyward's* case, 2 Co. 35. he being the party agent, has his election to go to which he pleases) it would be insufficient to say he did not go to *York*, because though that be true, yet he may have performed the condition by going to *Lancaster* within the time: And for this the book of 21 Ed. 3. 29. b. is an authority, where both parts of the disjunctive are possible (as in the case I now put) though it was otherwise resolved there in the principal case, because it appeared that one part of the condition was become impossible by the act of God, and therefore as to that there was no occasion to take any notice in assigning the breach. If I covenant to do an act by myself or my assigns, the breach must be in the disjunctive, so as to take in both ways by either of which that act might be done. So is *Cre. Eliz. 348. Salk. 139*.

The same exception was taken about two years since in the case of *Read v. Jenamie*, but I cannot say it received any judicial opinion. The court did seem to come into it, and the plaintiffs discovering their opinion, would not stand another argument, but applied below and got it amended.

The next exceptions to the writ are such as arise by comparison of it with the other parts of the record, from which it varies in several instances. I forbear to mention them all, but shall rely upon those which I apprehend to be most material. But before I do this I must observe, that we are in the case of a description of a record, which the court requires to be made strictly, and more strictly where the suit is founded upon that record, than where it is only described in a writ of error, in order to remove it out of one court into another. And there will follow no inconvenience, if the court in these cases ties up the party to an exact description; because if he be but careful, he may do it with the utmost exactness, and it is his own laches if he mistakes.

The

The first variance is, that in the writ it is said, the defendants *manuceperunt et uterque eorum manucepit pro Richardo Welbourn in 106 l.* whereas the recognizance runs, that they *recognoverunt et uterque eorum recognovit se debere eisdem* the plaintiffs in 106 l. Now the words *manucapio* and *recognosco* are of different significations: The latter indeed does import a being bound in a sum, and therefore is properly used in these cases; but *manucapio* was never taken in that sense: It signifies a receiving another into custody, of which the usual expression is, *quod traditur in ballium*. There is a great difference between *recognovit se debere* so much, and *manucepit* in so much: For *recognovit se debere* creates a duty to the party, and is an immediate lien; but *manucepit pro J. S.* is no lien as to the plaintiff in the action, no more than to any body else. It may as well refer to the court who delivers out the party, and thereupon he undertakes to the court that the party is forth coming. It is not *manucepit to the plaintiff* for such a one, but *manucepit* generally, which form may be proper to be used in this court, where the bail is not bound in a sum certain, but the *quantum* left intirely uncertain till judgment; whereas in *C. B.* where the sum is mentioned, and thereby reduced to a certainty, they use the strongest words to bind the party, so as to make it a certain duty depending only upon a condition subsequent. And in this case I must submit, whether it is not releasable by the word *debts*, as a bond is before it becomes due, because it is *debitum in praesenti quamvis solvendum in futuro*, according to *Co. Litt. 292. a.* But according to *Hoe's case*, 5 *Co.* the word *debts* will not release a recognizance of bail entered into in this court, because there is no certain duty created at the time of entering into it.

The next variance is, that the writ runs, *quas quidem 106 l. iidem* the bail *recognoverunt de terris et catallis suis fieri*, whereas the record is *voluerunt et concesserunt*, which are the proper words in that place, for though *recognosco* be proper to signify they bound themselves in that sum, yet *concedo* is always used when they come to describe in what manner the parties agree it shall be levied. They *recognoscunt se debere* so much money, which they *concedunt* shall be levied in such a manner.

The other instances of variance are, where the writ contains more than is in the record. And to these I would premise a distinction, which I have often heard laid down in this court, and that is, where records exceed, and where they do not come up to the description: Where they exceed the description, it will be well enough, for every excess implies a fullness, and if there be a full answer to the description it is as much as is required; but it is otherwise,

otherwise, where the record does not come up to the description, according to the cases so often cited of late of *Rogers v. Lloyd* and *Alston v. Lucan*. In one the writ of error contained an addition, which was not in the record, and for that variance it was quashed; but in the other, where the writ had omitted the addition, the record was held to be well removed.

And if the crowding in an unnecessary description in a writ of error, to which the record does not answer, will for that reason vitiate it; I may argue *a fortiori* in the case of a *scire facias*, which is in the nature of an action; for there the court is stricter than in writs of error, in requiring an exact description, because otherwise the party might bring two actions, the one varying from, and the other agreeing with the record.

The first variance is, that by the *scire facias* the defendants were to forfeit the money, if the principal should happen *in aliquo modo defaultam facere*; but there is not a word of this in the recognizance itself.

Another variance is, that in the writ the defendants are made to undertake, that if the principal be condemned in that action, or judgment be given for the plaintiffs, that then he shall pay. In the record it is only that if judgment be given for the plaintiffs, without any mention of being condemned.

In one he is to render damages *in curia assidenda seu aliquo modo adjudicanda*, but the recognizance is only for damages *in curia adjudicanda*, without any mention of the words *assidenda seu aliquo modo*.

It will perhaps be said, that these variances are not to be regarded, because they do not alter the sense. But that will be no answer at all. In *Dr. Drake's case*, *Salk.* 660. the word *nor* was put instead of *not*, but it was not in a place where it influenced the sense one way or the other, and yet the court held it a fatal variance, for it was the carelessness of the party: And *Powel J.* said, that in all cases where the party had a record or other matter by which he might make an exact description; in such case every variance was fatal. That if the court once gave into solutions of those variances, they would never know where to stop; and for my part says he, whilst I keep up to the settled rules, I look upon myself as lying in harbour, and therefore I will never consent to set out to sea again. *Mich. 2 Ann. in B. R. Chetley v. Wood*, there the recognizance was described as taken in court, and upon *nul tiel record*, it appeared to have been taken at justice *Neville's* chamber, and by him delivered into court; and it was adjudged that the plain-

Salk. 564.

659.

tiff had failed of his record: and yet in as much as the recognizance took its effect from the inrolment, it might not be improper in a legal sense to say it was taken in court; but because the fact was otherwise, the court held them to describe it according to the fact, and not according to the operation of law.

I have now done with what I had to offer in relation to the form of this writ, and shall therefore in the next place proceed to shew, that it is defective in point of foundation; that it has issued without lawful warrant, without any foundation at all. 1. In respect of a defect in the process by which the principal was brought into court, and upon which it appears the recognizance was taken. 2. In regard the recovery against the principal, upon which this *scire facias* is grounded, was in another action than that wherein we were bail. 3. Because the plaintiffs did not declare within two terms after appearance, according to the course of the court. And 4. Because the original cause was never regularly continued in court.

1. I shall endeavour to shew, that the process by which the principal was brought into court, and upon which the *capias* issued, and the recognizance was taken, is a naughty process; and that, because two different actions are joined in it, debt and trespass; it is *de placito transgressionis acetiam de placito debiti*; which cannot be joined together, for the process to bring in the party is different, in debt by summons, and in trespass by attachment. The one is founded upon a privity of contract created by the party or the law, and survives against the executor; whereas the other is founded upon a tort, and dies with the person. Besides, the same plea will not answer both, and for that reason it has been held, that *assumpsit* and trover cannot be joined. 1 *Ven.* 366. *Salk.* 10. 1 *Sid.* 244.

If therefore the original, which is the ground of all, is faulty; it follows, that whatever stands upon that foundation must fall with it. But the recognizance derives its obligation from thence; and therefore can have no force, when that is removed.

2. But if the court should be of opinion, notwithstanding this exception, that the principal was well brought into court, and the recognizance well taken; yet I must submit in the second place, whether it does not appear, that the judgment upon which this writ is grounded, was in another action than that to which the bail was given, which was in a plea of trespass with an *acetiam de placito debiti*, whereas the judgment is in an action of debt upon a bond, on the recovery in which action it is admitted by this record, that the *scire facias* is grounded. I am sensible it would be

mispending time, for me who am counsel only for the bail, to go into a long argument to prove, that the court of C. B. cannot upon an original in one species of action take any cognizance of an action of another kind against the principal: that court has no jurisdiction to hold plea in any case, but upon the King's original writ issued out of Chancery, except in the case of persons having the privilege of that court, which is not pretended in this cause. The original is the commission to the court to hold plea between the parties in the particular cause described in it, but gives no jurisdiction to proceed in any other cause though between the same parties. But I do not apprehend, how the determination of that question can have any influence in this case, since whatever effect it may have as to the principal, yet it can never reach the bail, so as to subject them in any other action than that wherein they were bound; so that I need only prove these to be different actions, which cannot be taken to be the same. And I apprehend, the thing proves itself, for the court will never intend, that this action of debt, wherein the defendant appears to be brought in by summons, can be grounded upon, or receive any sanction from an original, wherein debt and trespass are both joined. Those proceedings must be taken to have another foundation, viz. an original in debt, and not to be grounded on one which will not warrant the judgment, according to the case of *Chapman v. Barnardiston*, where Lill. Ent. 221. an original in trespass was held not to warrant a declaration in trover. So in 2 *Ven.* 153. in trespass the writ was recited to be *quare clausum fregit et herbam ibidem crescentem conculcavit et consumpsit*, but the declaration had omitted the *clausum fregit*: (and so has the declaration in our case) and for this fault the judgment was arrested after a verdict. So is *Cro. El.* 329, 185. I do not cite these cases (as the immediate tendency of them is) to prove that the declaration shall be held ill, because it does not tally with the recital of the writ, for I am sensible the modern resolutions are, that in order to overthrow the proceedings, they must be compared with the original itself upon a writ of error: but the use I would make of them is, to shew, that if the writ and the declaration do so vary, that will be cause to reverse the judgment. And from hence I presume an original in debt and trespass shall never be taken as the warrant for proceeding in debt only, since the only effect of such a presumption will be, to overthrow those proceedings, which it was introduced to support.

But further, we may safely lay all this aside, and there is no occasion to make use of intendments in this case; since it manifestly appears, that these are different actions; for by the record of the recognizance the principal comes into court, and is let out upon bail in *Hilary* term; but the action wherein the recovery is, appears to be

be of *Trinity* term, for the *placita* is of that *term*, and in that term it is recorded, that the principal *summonitus fuit* to answer the plaintiffs; so that it is absurd to say, the recognizance of *Hilary* term shall extend to an action commenced two terms after, *viz.* in *Trinity* term.

If therefore these are taken to be distinct actions, it necessarily follows, that the defendants by becoming bail in one, made no undertaking for the other; and though they would be liable to any recovery in the action to which they were bail, yet they were not answerable in any action which must proceed upon some other foundation; and it is already admitted upon this record, that the judgment with which they are charged, was in this collateral action.

But even admitting, that as to the principal this declaration in debt was well delivered as a declaration by the by, (though that cannot be after the term wherein bail is filed) yet what we insist upon is, that as to us who are the bail, the plaintiff is confined to declare according to the process; for though there are two different actions joined in it, yet both together make but one *loquela*, which cannot be split: It must be a recovery *in ista actione* to charge the bail. And therefore where the plaintiff has declared for more than in the process, that declaration has been taken to be one delivered by the by. 3 *Keb.* 16. *Mich.* 3 *Ann.* *Bovey v. Wheeler*, and *Salk.* 102. And there is great reason why the plaintiff should not be allowed to vary in the least as to the bail; for I would for argument sake suppose, that when the defendant comes into court, and finds the plaintiff has done wrong in joining debt and trespass together in the same original; thereupon he applies to his friends, and shews them the defect, how it is impossible the plaintiff can ever succeed in that action; and upon that account he procures them to be his bail, who would otherwise have refused to stand for him in a proper action: I must submit it, whether it would not be a hardship to let the plaintiff charge the bail by delivering a declaration in debt only, when perhaps he set out wrong at the beginning with no other view but by that means to get good bail to his action. In *Yelv.* 52. the recognizance was, that the principal should upon eight days warning appear to an action to be brought for such a debt, or they (the bail) to pay the money: the breach was laid in not paying so much recovered against the principal, without shewing it to be an action wherein he had eight days warning: and for this fault the court held it ill; and *Popham* who gave the rule said, that as to the plaintiff and defendant a voluntary appearance without eight days warning should bind, for the defendant had submitted to it, *et volenti non fit injuria*, but yet they could not by any agreement among themselves subject the bail in any other method of proceeding than was mentioned

mentioned in the obligatory instrument; so that a voluntary appearance should not bind them who became only answerable for a compulsory one.

3. But if the court should be of opinion, that the recognizance was well taken as to that action wherein the principal is condemned; yet I take it, that the bail are discharged, because the plaintiffs did not declare within two terms after appearance, according to the course of the court, and as the 13 *Car. 2. c. 2.* requires. This is the fact which is admitted to us, and it will be no answer to say, that though the defendant might have refused the declaration, and signed a *non pros*, yet if he accepts it, all will be well enough; because his acceptance, which is an estoppel to himself, can never have that effect against us, who are his bail, for the same reason that the act of the bail is no estoppel to him, according to the case of *Needham v. Dewaivre* in this court, *Trin. 1 Geo. rot. 399.* There the defendant pleaded misnomer in abatement, and the plaintiff replied by way of estoppel, that he had put in bail by the name in the declaration; but the court held, that estoppels arise against a man by his own act, whereas this was the act of the bail. So is *Salk. 3.* and the case I cited before out of *Yelverton*, where a voluntary appearance was held to bind the party, but not the bail.

4. The last branch of my exception to the foundation of this *scire facias* is a discontinuance. For the appearance was in *Hilary* term, since which that action has never been prosecuted, as appears by the return of the *certiorari*, so that as to that action the principal and bail were all out of court, and that cause never regularly continued in court. It must be observed, that this objection in the manner I now make it, must take its rise from an opinion, that the proceedings in *Trinity* term have no connexion with, or dependance upon those of *Hilary* term. I would now consider it in another view, by supposing them to be in the same action, so as to put it both ways, either they were, or they were not; if they were, even then there is a discontinuance between *Hilary* and *Trinity* term. If they were not, then the first cause has never been prosecuted; and as to the second, the bail are not liable in that collateral action: So that taking it either way, it will appear, this *scire facias* has issued without a proper foundation.

To recapitulate the substance of what I have offered. First, we say the principal was never regularly in court, and consequently the recognizance was void. But if he was well brought into court, and the recognizance well taken; yet it will not subject the bail to that action wherein the plaintiffs have recovered. And if it will extend so far, yet it appears, the declaration was not delivered in

time, nor that cause ever regularly continued in court. But if the court should be of opinion, this writ is good in point of foundation, yet then we say it is defective in point of form. The breach is not well assigned, for the reasons I before mentioned. And lastly, though none of these points should be with us, yet the variances are fatal. And therefore I pray, the award of execution may be reversed.

Reeve contr. As to the exception to the breach; we have assigned it in the words of the condition, which are, that he shall render himself *in executione judicii*. And though I must admit the instances put, where this condition may be performed by a render which may not be in execution of the judgment; yet no case can be shewn, where the plaintiff is obliged to assign the breach so large as to exclude all the different ways which may be construed a performance within the intent, though not within the letter. In such a case the party must come and excuse himself, and the law, in favour of him who perhaps has complied as far as was in his power, will allow that excuse. A condition to re-enseoff is performed by lease and release; but yet it was never alleged, that the party did not make a release, but only that he did not re-infeoff; and if he did make a release, that must be shewn on the other side. The precedents are as this writ is. *Co. Ent.* 616. *Officina Br.* 277, 297.

As to the variances, I shall not enter into any debate whether they are material or not; but what I rely upon is, that they ought to have demanded *oyer* and taken advantage below. Now it is too late; for the recognizance is not properly before the court, and they ought not to have brought it up. And as to what is said as to the effect of *in nullo est erratum*, I take it in this place to be a demurrer to this part, which is immaterially assigned. I believe a deed or a bond was never sent for up by a *certiorari* in order to assign variances between them and the declaration, but the proper way to have advantage of those variances is to pray *oyer*. This recognizance is in the same reason with the bond or the deed, for it is the specialty upon which the action is grounded.

As to the other objections, which go to the judgment in the original action: The answer I give them is, that these defendants cannot assign that for error, for the bail can assign no matter which lies properly in the mouth of the principal: they alone, or by joining with the principal, cannot have error of that judgment. They cannot assign that no *capias* issued against the principal. 1 *Ven.* 38. And this answer will serve for the objection, that the declaration was not delivered in time; for they are so far from having a power to assign that for error, that in 2 *Ven.* 143. it was held, they could
2 not

not so much as plead it to the *scire facias*. And every body knows, that even matter which is pleadable to the *scire facias*, as a release, cannot be taken advantage of after judgment in *scire facias*, no not by *audita querela*. *F. N. B.* 104. i.

Strange replied. Our pleading over can never cure a defect in their assigning the breach. In 1 *Sid.* 184. in trespass the plaintiff had not alleged a possession, and it was held, Not guilty did not cure it. So in *Butts's case*, 7 *Co.* it is said, pleading over shall in some cases help a defect in point of form, but in no case a defect in point of substance. This case of a recognizance differs from that of a bond, one is a matter of record, and the other *in pais*, and it may as well be brought up as the original is. But whether it was proper to send for it or not, is not now the question, since they have admitted the fact to be as we have alleged it, and then put it in judgment, whether upon that state of the case it be error in point of law or not. It is as insufficient to assign the breach in the words, as it is to plead performance, which may be ill. *Lat.* 16. The covenant was to deliver all his money, and held not sufficient to plead he had delivered all. The general answer, that the bail shall not impeach the judgment against the principal, will not go to my second objection; for there I do not dispute the validity of the proceedings as between the parties, but only insist they are not binding as to the bail. As in the case in *Yelverton* the bail did not overthrow the judgment for want of eight days warning, but only made use of that objection to excuse themselves, without impeaching the proceedings *quoad* the principal.

C. J. Some of the exceptions would hold, if the party did not come too late; and others, if they came out of the mouth of the principal. But as they lie under both those disadvantages, in coming too late, and from an improper person; I think they can have no weight in this case. The objection to the breach strikes at the recognizance itself, which is indeed but oddly penned. It should not have been so strait, for courts of justice ought to take such as will answer the effect of the plaintiff's demand. The effect will be answered by a render, though not *in executione judicii*, provided the party be liable to be so.

The others inclined to affirm. But it was put off to another day, when Serjeant *Brantbwayte pro quer' in errore*, argued, that the breach is not well assigned, because they charge us with not doing an act, which can only be the act of the plaintiff in the action (*i. e.*) the having him in execution of the judgment. For all we can do, is to surrender him, so as the other may have him in execution; but to surrender him in execution is not in our power. I agree it
is

is a general rule, that the breach may be assigned in the words of the condition; but it is with this exception, which goes to our case, that where the natural performance of that condition is what the words themselves do not import, there you must leave the words, and go to that which amounts to a performance within the intent of the condition. A pleader is to go according to the operation of law, and not the words of a deed. The grant of one jointenant to another must be pleaded as a release. 2 *Saund.* 97. As to the precedents, they were as much in favour of the case of *Chetley v. Wood* in *Salk.* 659. as they are in this case, but yet they had no influence upon the court, because they said they were against law.

As to the variances, they were so fully preft upon the former argument, that I shall not meddle with them; nor indeed is there any occasion, for I do not find it is so much as pretended, that they are any ways to be solved. But the only thing I shall apply myself to is, to prove that we are not too late to have advantage of them, which was objected to us. I agree, no variance can be assigned between the bond and the declaration, upon a writ of error; and the reason is, because in judgment of law the bond which was once in court is delivered out again to the party at the end of the term. But that reason has no place in the case of a record, which always remains in court. This court sends to inferior courts for their records, and will adjudge upon them, though the party might have had the same advantage below. A man below may have *oyer* of an original upon which the *scire facias* is built. And for the point, that he was not too late, he cited *Yelv.* 218. *Hob.* 4. 2 *Cro.* 331.

Reeve contra. After a *scire feci* returned, the party cannot have advantage of what might have been pleaded. *Salk.* 262, 264. There is no difference between a record and a matter *in pais*, where it is not part of the same record, as this recognizance is not. 11 *H.* 4. 47. *b.* 1 *Roll. Abr.* 760. The defendants might have had a writ of error *tam in redditione judicii quam in adjudicatione executionis*; and if upon a common writ of error the same advantage might be had, what occasion was there to provide a special one? And this differs widely from the case of an original, for that is only part of the process: But this is like a note or a bond, the ground and cause of the action.

C. J. At present this recognizance is no part of the record. The defendant by praying *oyer*, might have made it so; and if the court below had denied *oyer*, (which by the way they did) he would have had the same advantage on a bill of exceptions. I am sorry those

who were concerned below had not the courage to do it, for by this means we are now to affirm a judgment, which if all the parts of it were properly before us, we should be bound to reverse, and by this artifice the justice of this court is eluded. *Powys J. accord'.*

Eyre J. In *Trevivian v. Lawrence* (which I was counsel in) the judgment on which the *scire facias* was brought, was really of another term than the recital mentioned; and the court held; we could have no advantage of it after a *scire feci*.

Adjournatur, to look into the case in *Yelv.* And the last day of the term the Chief Justice said, they had perused the record, which is *Trin. 9 Jac. 1. rot. 305.* and nothing is entered there, but the award of execution, with a mark in the margin, that a writ of error was allowed; and whether the judgment was fetched up by a *certiorari*, or by a special writ of error, does not appear in the report (but they inclined it was by the latter) so that case was of small authority. The judgment of *C. B.* was affirmed.

Michaelmas Term

6 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Nicholas Lechmere, Esquire, Attorney General.

Sir William Thompson, Knt. Solicitor General.

Memorandum; The Lord C. J. Pratt was absent all this term, being ill of an ague and fever.

Leighton *vers.* Leighton.

Officer examined as to condition but not substance of records.

WEARG moved, that the keeper of records and fines in *com' Monmouth* might attend the trial at bar with some of the original records, to answer an objection, that had been made upon a former trial, that all the records were worn out and obliterated. *Sed per curiam*, We never do it: You may have a rule for copies. And though the officer cannot be examined as to the matter of a record, yet he may give evidence of the condition of them in general, without producing them, and that will answer your purpose as well.

Hassel's case.

FAZAKERLEY moved for a *mandamus* to be directed to the justices of peace of the county of *Chester*, commanding them to make a rate, to reimburse one *Hassel* the money he had expended as surveyor of the highways. And it was granted. *Mandamus to reimburse surveyor of highways.*

Asplin and Gray.

PER curiam, If the declaration be delivered so early in term, that the defendant has eight days in that term, he cannot move to change the *venue* the next term. *Practice, ver-
nuc.*

Harvey *vers.* Porter.

PER curiam, If on an old issue notice of trial be given before the first day in full term, it is sufficient; and it need not be given before the effoin day. *What is a
term's notice
of trial.*

Between the Parishes of Ratcliffe Culy and Exall in Civit'
Coventry.

UPON an order for removal of a widow and her two children from *Exall* to *Ratcliffe Culy*, it appeared, that some time since one *A. B.* was hired and served for a year in the parish of *R. C.* and gained no other settlement before his death, therefore the justices adjudge the wife and her children to be settled in *R. C.* and send them thither as to the settlement of the husband. *An order to
common in-
tent is good.*

Reeve moved to quash the order, because a married man gains no settlement by any hiring or service; and likewise because the children are called *her* children and not *his*. *Sed per curiam*, We never make intendments to destroy an order, and it does not appear he was married at the time of the hiring, and if he was married during the service, that will not prevent his settlement. And as to the children, we must intend them to be *his* by *her*, till the contrary appears; and that they are so is implicitly averred in the adjudication of the childrens being settled with him; for that they could not be, if they were her children by a former husband, so we must take them to be his. Order confirmed.

Palgrave

Palgrave *vers.* Windham.

Construction
of 8 Ann. c.
17.
Lill. Ent. 46.

CASE by the plaintiff as administrator of J. S. against the defendant as bailiff of the liberty of the duchy of *Lancaster*, for executing a *fiery facias*, and removing the goods off the premises before the landlord was paid his year's rent, pursuant to the statute 8 Ann. c. 17. The general issue pleaded, verdict and judgment *pro quer'*, a writ of error brought, and the general errors assigned.

Yorke pro quer' in errore, made three points: 1. Whether upon this statute any action lies against the officer. 2. Admitting it does, whether in this case the plaintiff has disclosed sufficient matter to maintain an action. And 3. Whether it will lie for an administrator.

1. The first point depends upon the words of the statute, which are, "That no goods shall be liable to be taken by virtue of any execution, unless the party, at whose suit the execution is sued out, shall before the removal of such goods from off the premises, pay to the landlord or his bailiff one year's rent (if due), and the sheriff or other officer is impowered and required to levy and pay the plaintiff as well the money so paid for rent, as the execution money."

Upon this it is plain, that the plaintiff in the action, and not the officer, is the person who is to be accountable to the landlord; and if he does not pay the rent, the landlord will have his remedy against him. But what is all this to the officer? He is to execute the King's writ in the ordinary manner, with this only difference, that if the plaintiff pays the rent, then he must go farther, and levy that as well as the execution money; but if it be not paid (as in this case it appears it was not) then the payment being in the nature of a condition precedent, the officer was not obliged to go out of his way, and consequently there were no *laches* whereon to found an action.

2. But if an action will lie against the officer, yet I apprehend the plaintiff has not disclosed sufficient matter to maintain one, no, not even to have obliged the plaintiff in the action, to pay the rent; for here is no notice or demand alleged, and as this is a matter which lies only in the knowledge of the landlord, he ought to do the first act, by giving notice. 1 Roll. Abr. 463. pl. 16. Hob. 51. Alleyn 24. 1 Bulst. 12. In a *quantum meruit*, you always aver notice.

It will be said, that there is notice to the officer, but I take that to be as none, for no body will say the officer was bound to pay the money himself; and as to the verdict, it is true, that will help what is alleged, but can never add any new fact not mentioned in the declaration. *Salk.* 364.

3. This action lies not for an administrator. For the *git* of this action is either the non-payment of the rent, or the tort in removing the goods. If the first, then I say the officer is not bound to pay the money. If the second, then this being a personal tort, an administrator can maintain no action for it. The intestate had no particular interest in the goods (as the plaintiff in the execution after payment of the rent would have) but this is an action arising merely *ex delicto*. At common law before the statute *de bonis asportatis in vita testatoris*, it is certain an administrator could have no such action; and I take it, that statute has never yet been extended so far as this case. In the cases of ejectment, ward, and *quare impedit*, there was an interest vested before the death of the testator, of which there is none in this case.

Brantwayte Serjeant *contra*. The mischief intended to be remedied by this statute was, the fraud which tenants committed, in setting up a sham execution to defeat the landlord of his rent; and therefore it ought to have a liberal construction. The words are prohibitory, that the goods shall not be removed; and therefore as the officer had notice, he should have stopped his hand till the money was paid, and not have removed the goods, to evade the statute. And it would have been a good return, for him to say, that he had seized the goods, but could not proceed to expose them to sale, for that the landlord had demanded a year's rent pursuant to this statute, which the plaintiff was not there ready to pay.

As to the want of alleging a demand upon the plaintiff in the action, that is not the *git* of this suit, it is the tort in removing the goods; and there being notice to the officer, his proceeding after is a wrong to us, for which he is answerable. But surely after a verdict, every thing necessary to make this an offence, must be supposed to have been proved.

As to our suing as administrator, there are cases stronger than this. The difference is in actions *by* and *against* an administrator. This is not a wrong to the person, but to the estate of the intestate. Upon the statute of *E. 6.* an action lies *by* but not *against* an executor, for not setting out of tithes. *1 Sid.* 88, 407. *1 Ven.* 30. In *4 Mod.* 403. an executor maintained an action for a false return.

Here the intestate had an interest in the goods; they were a pledge for his rent, but are now lost. This was over-ruled in *C. B.*

Yorke replied. In the case of tithes there is an interest vested, and that in 4 *Mod.* was after execution, where the sheriff having the money in his hands, was liable to an action of debt. *Cro. Car.* 539. But *Jones* 173. the better opinion is, that upon mesne process such an action is not maintainable. In that case too the debt was absolutely lost, but here the landlord or his administrator may still sue the tenant for his rent.

Powys J. held the action lay against the officer for the tort, and that though notice is requisite, yet the want of alleging it is helped by the verdict. And that the removal of the goods was a wrong to the estate of the intestate, for which his administrator might maintain an action. *Et per Eyre J.* As the officer had notice, that is enough to subject him, though it does not amount to a demand of the money of the plaintiff in the execution; which, though the statute is silent, yet upon the reason of the thing I take to be necessary. Executors and administrators may sue for an escape, and here the intestate had an interest, for which his administrator may bring an action. To which *Fortescue J.* agreed. And the judgment of *C. B.* was affirmed.

N. B. I was counsel in this cause as an assistant to a Serjeant in *C. B.* and took another exception, that there was no such statute as the plaintiff had declared upon, for he sets out with one made at the Parliament begun and holden 8 July 8 Ann. when it was in 7th of that Queen. But the court held, that the saying afterwards *contra formam statuti in eo casu editi et provis* had set the matter at large: And then it being a public act, they were bound to take notice of it. And the plaintiff was not prejudiced by the mistake.

Wegerflosse and Keene.

There may be a partial acceptance of a bill of exchange.

ACTION upon the case upon the custom of merchants brought by the person to whom a foreign bill of exchange is made payable, against the acceptor. And the declaration sets forth, that one *James Collet*, being a merchant residing at *Christiania* in *Norway*, according to the custom of merchants drew his first bill of exchange upon the defendant, requesting him to pay the plaintiff such first bill (his second not being paid) of 127 l. 18 s. 4 d. which bill was afterwards, viz. 9 December 1717. shewn to the defendant, who accepted to pay 100 l. part thereof, upon the 8th day of

of February following, by virtue whereof he became chargeable, *et in consideration inde eisdem die et anno ultimo supradictis super se assumpsit*, to pay the same on the said 8th day of February *tunc prox' sequentem*, which he has not done according to his undertaking. There is likewise a count for monies had and received, and an *in simul computassent*. The defendant as to those two counts pleads *non assumpsit*, and as to the count upon the bill, he pleads, that the said James Collet drew another bill for 100 l. only, wherein he countermands the payment of the odd 27 l. 18 s. 4 d. by virtue whereof the defendant paid the 100 l. in satisfaction of the first bill, and the plaintiff accordingly received it in satisfaction. The plaintiff, *protestando* that the defendant did not pay it in satisfaction; for plea saith, that he never received it in satisfaction. And to this replication the defendant demurs.

Strange pro defendente. I shall not trouble the court with an exception which has formerly been taken to these replications, that the payment in satisfaction being admitted, the traverse of the acceptance is immaterial; for I am sensible, it has been adjudged to be well enough in the case of *Young v. Ruddle*, Salk. 627. and of *Hawkshaw v. Rawlings* in this court, Hil. 3d of his present Majesty, upon this ground, that there can be no payment in satisfaction, without an acceptance in satisfaction; and therefore a traverse of the acceptance is an argumentative denial of the payment; for if the plaintiff did not accept it in satisfaction, the consequence of that is, that it was not paid in satisfaction.

Laying therefore the plea and replication aside, I shall take up the case as it stands upon the declaration, and upon that offer some things distinctly, both as to the matter, and as to the manner of it.

As to the matter of it, the case is no more than this; the person to whom a foreign bill of exchange is made payable, brings his action against the drawee, upon a partial acceptance for so much of it as he undertook to pay, and counts upon the custom of merchants.

The single point which will arise upon this case is, whether a partial acceptance be good or not within the custom of merchants. And I shall endeavour to prove, that this acceptance is a void acceptance, and consequently the plaintiff has no cause of action.

That I may not be misunderstood when I call this a void acceptance, I would premise, that I do not mean, it is so absolutely void as to exclude any remedy against the acceptor, for I must admit, that this acceptance will create a contract between the parties, upon which an action upon the case would have laid. But what I shall

shall insist upon is, that this is a void acceptance within the custom of merchants, upon which the plaintiff has founded his case; and if it be void within the custom of merchants, then, whatever effect it would have as a private contract between the parties, will be a matter foreign to the present question, in as much as the plaintiff has not relied on it as such, but has brought his action upon the custom.

I have inquired into the practice of merchants in this case, but have not been able to get any certain account of this matter. The true reason of which I apprehend to be, that it is a case which seldom or never happens amongst merchants, for they honour one another's bills, though there are no effects of the drawer's in their hands; and they would esteem it the greatest blemish that could be cast upon them, if their correspondent should once refuse to answer their bills any further than they had effects in his hands.

What account I have received, I shall submit to the court. Some are of opinion, that an acceptance for part is an acceptance for the whole, in as much as it deprives the party of the benefit of protesting, and so resorting back to the drawer. But I apprehend there is no reason at all for this. To say that because commonly a man does honour another's bill beyond what effects he has in his hands, that therefore he must do it, is a strange conclusion. For suppose he has but 20 *l.* of the drawer's in his hands, and is bound to answer a bill for so much; it would be highly unreasonable, that in case the other should draw for 10000 *l.* this man must either pay the whole, or subject himself to an action for non-performance of the condition.

But if this notion should prevail, that an acceptance for part is an acceptance for the whole, yet as on the one hand it charges the acceptor with the intire sum, so on the other hand it discharges him of this action. For then there can be no colour to split the demand into two actions, but the plaintiff, in declaring for part ought to shew, that the rest is satisfied. *Salk.* 65.

Others are of opinion, that the party ought not to have taken this acceptance, but protested the bill as to the whole, and sent for another to the value of what the drawee would answer. This likewise makes for the acceptor the defendant.

I am informed indeed, there is one gentleman does attend to say, that this matter has happened in his own experience; but he by what I find is alone in that opinion, and perhaps may not have considered the consequences of it.

As there is this diversity of opinions upon a matter which seldom or never comes in practice, I shall take it upon the reason of the thing, with a view likewise to the many inconveniencies which will follow as a consequence of establishing this partial acceptance.

The better to come at this, it may not be improper to state the method of transacting these affairs. When the party to whom a bill of exchange is made payable receives it, he immediately applies to the drawee to get his acceptance: if he accepts it, nothing farther is done till the day of payment, and then if it be paid the matter is at an end. But if the drawee will not accept it, then the party is to protest the bill, and send back the protest by the next post. When the time of payment comes, he tenders the bill again, and then the drawee may either pay it or refuse it: if he refuses it, then there is second protest for non-payment, and the bill itself is returned. And so it is if he accepts it, and afterwards refuses to pay it. From all this I would infer, that there can be no partial protest for non-acceptance, which as I am informed is a protest not in the memory of any but one of the notaries publick. The words of all protests are, *I exhibited the original bill to the person to whom directed, and demanded his acceptance thereof*. Now an acceptance of part is not an acceptance *thereof*, no more than payment of part is a payment of the whole. There is a book which goes by the name of *Advice concerning bills of exchange*, and is esteemed amongst those who are most conversant in these affairs. And in *fol. 33.* of that book it is said, that nothing but an acceptance to pay *secundum tenorem billae* can deprive the party of the benefit of a protest. And in *fol. 16.* of the same book he puts the case of a bill drawn on *A.* and *B.* who are not joint traders, and an acceptance by one only: this says he goes for nothing, and the party must protest the bill as in case of no acceptance. These are the words of the book: and by putting the case of two who are not joint traders, I should apprehend he means, that each being charged with a moiety, the acceptance of one is but an acceptance to pay a moiety, which is but a partial acceptance, and therefore void: and this is explained by the case of *Pinkney v. Hall, Salk. 126.* where one joint trader accepted a bill, and it was held to be the acceptance of both, because both were equally liable to pay the whole. And to this purpose likewise, is *Molloy de Jure Maritimo* in the chapter concerning bills of exchange.

If there can be no protest for non-acceptance of part, I would consider how the case would stand in regard to allowing this partial acceptance: the natural and plain consequence of that will be, to put it in the power of the drawee, to defeat the other of the benefit of protesting a bill for 10,000 *l.* by his acceptance to pay

one penny only; for this I would submit, that if the party *may* take such an acceptance, he *must* take it: if it will be good, he cannot refuse it, for it is not at his election to charge the drawer but upon the other's default; the drawee is the person he must first resort to, and if he refuses, then and not till then, is there a proper remedy against the drawer; and therefore in the action against the drawer the plaintiff must shew a protest, which is an endeavour to receive the money of the drawee. *Salk.* 131.

But even admitting there may be a partial protest for non-acceptance, yet the inconveniencies which will follow of course are so great, that I hope it shall never be established by the judgment of the court.

It would be endless to put cases where it has been held, that rent-charges and the like cannot be apportioned; and therefore I shall rely entirely upon the reason of the thing, that in this case the contract between the drawer and the person to whom the bill is payable is entire and not divisible. By this contract the drawer (and consequently the indorser) subjects himself to an action if the money be not paid at the time: but though he becomes liable to one action, yet there is no reason, that by transactions between the party to whom the bill is payable, and the drawee, to which he is not privy, this contract should be branched out into several actions, which will unavoidably be the case of every partial acceptance: for I do not apprehend how this can be reduced to one action by refusing this partial acceptance, and protesting for the whole; because (as I observed before) if the party *may* take it, he *must* take it, and can charge the drawer no farther than there is a default in the drawee.

As therefore two actions are the fewest he can be charged with, I would beg leave to instance how he may be charged with a great many. The acceptor will charge him as far as his undertaking: then another for the honour of the drawer (as is usual amongst merchants) may undertake for another part, and by the same reason a third, and a fourth, and no body can say where it shall stop: so many different persons may accept for so many different pence, and every one of these has his distinct remedy against the drawer.

This is too great an inconvenience to be got over; and it is such an inconvenience (I mean the multiplicity of suits) as the common law has always endeavoured to meet with. In the case of *Hawkins v. Cardee*, *Salk.* 65. it was held, that the indorsee of part could have no action, because says my lord chief justice *Holt*, the drawer having only subjected himself to one action, it cannot be divided so as to subject him to two. If the grantee of a rent-charge levies a fine of part, the conusee cannot compel an attornment, for that

would be to give two actions against the tenant. So if a feoffment were made to a man and his heirs with warranty, and he makes a feoffment to two, the warranty is gone. If two take lands jointly with warranty, and one makes a feoffment: the warranty is gone as to him, but remains as to his companion, so as he may vouch for a moiety; and at common law if they had made partition, the warranty was lost. *Co. Litt.* 187. a. And all this goes upon that ground, that it being *res inter alios acta*, it shall not turn to the prejudice of a third person. But this partial acceptance is a matter transacted between mere strangers; and therefore shall not hurt the drawer, who was no party to it. No act of theirs, which would be prejudicial to him, shall bind him. But the subjecting him to several actions will be a prejudice; therefore he shall not be subjected to several actions.

The great benefit arising to the publick from these bills is, their being negotiable and passing about as well as money; for every body is sensible, that without the assistance of these bills our trade could never be carried on for want of sufficient *specie*; not to mention the trouble and danger in returning money, which is avoided by this expedient. It is this benefit which the publick receives from these bills, that has intitled them to all the favour they have received, of which innumerable instances might be given. For this reason it has been held, that the bare drawing or accepting a bill, makes a merchant for that purpose. *1 Salk.* 125. *Show.* 125. *2 Ven.* 295. Now if what is contended for on the other side should prevail, the publick will be deprived of this great benefit; for no man will take this bill as so much money in the way of trade, when he is to resort to one man for one part, and perhaps send out of the kingdom for the other to a place where he has no correspondent. In the case of *Jocelyn v. Laferre*, which was in this court *Hill.* 11 *Ann. rot.* 214. where the bill was to pay out of my growing subsistence, it was held, that in regard his growing subsistence might never amount to the sum drawn for, therefore this was not a bill of exchange within the custom of merchants, for no body would take it upon such a contingency. And the cases of promissory notes since the statute have gone upon the same reason. *Smith v. Bokeme*, *Mick.* *Ld Raym.* 1396. *1 Geo.* in *B. R.* which was to pay money or surrender a man to prison. And the case of *Appleby v. Biddle*, in *B. R.* *Hill.* 3 *Geo.* which was to pay so much to A. if I do not pay so much to B. and both these were held not to be within the statute, upon that only reason that they were not negotiable.

Another inconvenience which naturally occurs upon this occasion is, that the drawee will insist to have the whole bill delivered up, when he pays but a part only. For according to the authors who treat

treat of this subject he can never charge the drawer, when they come to make up their accounts, with more than he has vouchers for under the hand of the drawer. In *Lex Mercatoria* 274, it is said, that if the bill be lost, the drawee cannot justify the payment, though he has a letter of advice. And this refutes all the expedients of indorsing part, or giving a special receipt for so much, because in neither of those cases will the drawee have any authority to produce under the hand of the drawer. If the drawer then refuses to allow what the other has paid, his only remedy will be to bring his action; and how he will be able to maintain it upon the custom of merchants I must confess myself at a loss to find out, for he will want the necessary evidence to maintain such an action, which is the bill itself that was drawn upon him.

If this then will be the case, where he pays the money without taking up the bill; I must contend that by all the rules of prudence and justice he may insist to have the whole bill delivered up to him, when he only pays part of it according to his acceptance.

Supposing him then in possession of the whole bill, I would consider in what a condition we have left the party to whom it was made payable. He must be supposed to have advanced a consideration adequate to the whole sum, and consequently is in justice intitled to his whole money of somebody or other. It will be said, that he may get what he can of the drawee, and then go back to the drawer for the residue. It is true he may do so, and the drawer may be a man of so much honour as to pay him every farthing. But what must he do when he finds he is mistaken in his man; when the drawer (instead of ordering him the money as he expected) shall tell him, No, you have nothing to produce under my hand, and if you have been so foolish as to deliver up the bill, you must take it for your pains. I know of no remedy in this case but what would be worse than the disease, and therefore the prudentest thing he can do will be to sit down by the loss.

And this will be so far from being a trick in the drawer, that it will be no more than what every prudent man will do. For if upon the report of what has been done he should advance the residue of the money, yet still there is a bill standing out against him for the whole, upon which bill it cannot appear he has paid the money which the drawee had left unpaid. And whether in that case he would not afterwards be answerable for the whole, may be proper to be considered.

I have now done with what I had to offer in maintenance of the negative of the question I proposed to speak to, and shall therefore
proceed

proceed to take notice of what was hinted at upon the former argument in behalf of the plaintiff in this case.

It was said that the drawee may (and very often does) accept to pay the money at a different time from what is appointed in the bill. I must admit he may do so, but surely that case can bear no proportion to this case. It is not liable to any of the inconveniencies I mentioned; it is the same as if the bill had at first given him a longer time, and it is well known that after acceptance a month or two will break no squares where the man is good: With this further, that amongst merchants such an acceptance is esteemed a general acceptance to pay the money according to the tenour of the bill. Besides, *Molloy* says, that in such a case the bill must be protested, which cannot be done in our case.

It was further urged to be highly reasonable, that the drawee should honour the bill as far as he had effects. I admit this to be reasonable, and perhaps it would not have been impossible for the plaintiff to have declared in such a manner, as to have charged the defendant to the amount of his acceptance: But we are here upon the custom of merchants, and whatever might be reasonable in case of private property, will cease to be so, when it appears to be pregnant of so many inconveniencies to the publick as I have mentioned. And if the plaintiff has it in his power to frame a case wherein he may do himself justice, that makes the argument stronger against suffering him to break in upon the publick convenience for his private benefit. The policy of the law is, rather to let one man suffer, than to introduce a general inconvenience: But here we are to be led into the greatest inconveniencies, even in a case where there is no danger of the parties suffering in the least; for he has a remedy, which stands clear of all these inconveniencies, and there will be no harm in leaving him to that.

It was said, that if the drawer (who is supposed to know what effects he has in the other's hands) by drawing for more, subjects himself to several actions, it is his own fault. The answer to this is, that the very drawing for more, destroys the presumption that he knew how accounts stood. But amongst merchants, as I observed before, that is not the case, for they often honour one another's bill, where there are no effects at all.

But even admitting the drawer does not stand altogether clear of this objection, yet still this may be the case of one who cannot be supposed to know how the accounts stood between the drawer and the drawee: For it may happen this bill may be indorsed, and then the indorser is to be charged in the same manner

as the drawer. The indorser will be liable to several actions, though he is no ways privy to any of the transactions between the indorsee and the drawee.

Upon breaking the case upon the former argument a difference was taken between the case of the acceptor and that of any other person: that *he* should not come and discharge himself against his own acceptance, whatever the other might have done as to refusing this partial acceptance. If this was his case only, it might be reasonable to extend this acceptance as far as it will go; but the hardship is, that what is law in his case, must likewise be law in the case of the drawer and indorser; so that here are two innocent persons who are to be involved in the same common fate; and that is never to be suffered, especially when the drawee may be charged in another manner, which will not affect the drawer or the indorser.

But if this partial acceptance should be thought good within the custom of merchants: yet the plaintiff can never recover in this action, in regard to the manner in which he has declared.

My first exception is, that the plaintiff by his own shewing has brought his action too soon. This is a declaration of last *Michaelmas* term, and the acceptance is laid to be the 9th of *December* 1717. to pay upon the 8th of *February* following, in consideration whereof he did the same day and year last mentioned, which was the 8th of *February* 1717. promise to pay the money on the 8th day of *February tunc proxime sequen'*. Now there must of necessity be the intervention of a whole year between the 8th of *February* 1717. and the 8th day of *February* following: and then the case is no more, than that the plaintiff complains, that the defendant on the 23d of *October* had not paid him a sum of money which of his own shewing was not to become due till the 8th of *February* following. If it were necessary to cite cases in maintenance of this exception, there are 1 *Sid.* 373. 1 *Ven.* 135.

Another exception is, that the plaintiff has not alleged any request before bringing the action, which he ought to have done; for the merchant who accepts is easy to be found, but the party to whom the bill is made payable may only be a traveller to whom the other cannot resort to pay the money. And this differs from the case of a bond, for there it is for the benefit of the obligor to save the penalty, so there needs no request to him to do an act for his own benefit. It will be said, that the action is a request; but if it be, still it recurs to that question, whether a request at the time of bringing the action is sufficient. And it is plainly not so, for then

then it is a request to pay the money four months before it became due.

I shall trouble your Lordship with but a word more, and it is this, the bill runs, Pay this my first bill *my second not being paid*, and therefore I must submit it, whether they ought not to have averred, that the second was unpaid. Indeed in the case of *East v. Effington, Salk. 130.* it was held well after a verdict, because if the second was paid, the jury could not find *assumpsit* as to the first: he was not to pay the first unless the second was unpaid, so the jury finding him bound to pay the first, that is an argumentative finding the second unpaid. But the court in that case inclined, it would have been ill upon a demurrer.

It will be said, that this should have been shewn for cause of demurrer. But this exception goes to the cause of action itself, and may as well be taken advantage of upon a general demurrer, as the want of setting out an attornment was in the case of *Long v. Ante 106. Buckeridge.*

The whole both with relation to the matter and the manner of this declaration may be reduced to this dilemma: either this partial acceptance is good, or it is not. If it is good, yet the plaintiff has come too soon, without alleging what is necessary to make out his case, and consequently can never recover in this action. If it is not good, that alone will be sufficient to intitle us to judgment for the defendant.

Reeve contra. I am no otherwise prepared to argue this cause, than by acquainting the court, that a gentleman has often attended, to inform you, that it is practicable to protest a bill for non-acceptance of part, and then resort back to the drawer. As to the inconveniencies which are urged, they are as great of our side upon account of death or acts of bankruptcy. The drawee is not prejudiced; and as to the drawer, if part is paid, his debt is so much lessened, which is a benefit to him.

As to the first objection to the declaration, that we have brought our action too soon: it runs, *in praedict. octavum diem Febr. tunc proxime sequentem*; so to support the declaration you will reject *proxime sequentem*, and then it stands as a promise to pay in February 1717. and the action is in October following.

2. No request was necessary, for upon the acceptance a duty arises, and this is not a collateral promise.

3. If

3. If the defendant had paid the second bill, he should have pleaded that matter in his discharge: and as to the case of *East v. Effington*, that was against the drawer upon the first contract, but this is against the acceptor upon a new contract.

Strange replied. As to *praedict*, it does not make the sentence inconsistent with *proxime sequentem*; for it is common to call the same day in a different year, the same day generally: and here it is no more than that the party promises on 8 February in one year to pay upon the same day in another year: and where a thing is grammatically right, the court will never reject it, as was held in the case of *Wyatt v. Aland* in *B. R. Trin. 2 Ann.*

Salk. 324.

They should have shewn the second bill unpaid, for it is in the nature of a condition precedent to their having any right to this action. As to the request, no debt arises upon the acceptance, for an *indebitatus assumpsit* will not lie upon a bill of exchange. *Salk. 125.*

Powys J. Either party might have refused this partial acceptance, and they were at the same liberty to take it: neither could force the other to it, but if both agree, *volenti non fit injuria*. The drawer trusts all to the discretion of the person to whom he gives the bill, and if that person leads him into inconveniencies, who can help it?

Where a bill runs, Pay my first my second not being paid, action may be maintained on the first without averring the other was unpaid.

Eyre J. I think the declaration is well enough; we will reject *proxime sequentem*, and then all is right: there is no difference between the case of the drawer and the acceptor, for if he pays either of the bills, the drawer is not liable. Acceptance of one is so of both, though in fact it amounts to no more than an acceptance to pay the contents of one of them, and payment of one is a discharge of both: so that the averment that the money was not paid upon the first goes to the second also. I searched, but could not find the record, of *East v. Effington*; and by my notes I find it went off immediately upon the answer, that the verdict had cured it. The precedents are as this declaration. *Vidian Ent. 31, 67.*

Fortescue J. I think there is a difference between the case of the drawer and acceptor, for the drawer is bound to pay all, the drawing being an actual promise; but the acceptor is bound to pay but one, and no action can be maintained but upon the very note which he accepts. There is another answer to the objection, that the action is brought too soon; and that is, that the plaintiff needed not set out any promise at all. 10 W. 3. *Stalk v. Cheeseman*, *Salk. 128.* *Lowther v. Conyers*, which was upon a promissory note, and they had

had left out *super se assumpsit*, and yet it was held well enough, for the law raises a promise. And this is likewise an answer to the want of request. In *Molloy* and the other books there is a whole paragraph about the partial acceptance of a bill of exchange, and they allow it to be good. So judgment was given for the plaintiff.

In count upon an acceptance, an express *assumpsit* need not be laid.

Dominus Rex *vers.* Tucker.

YORKE moved to quash the return of a rescous of two persons, because it is only said, that they could not afterwards be found, without saying *nec eorum aliquis*. *Cro. Jac.* 419. 3 *Bullst.* 200. 1 *Roll. Abr.* 802. *Mich.* 11 *Ann.* *Davis v. Fuller*, where the return to a *scire facias* against three was, *non sunt inventi* generally, and held ill. 3 *Cro.* 50.

Non sunt inventi is no good return without *nec eorum aliquis*.

Darnall Serjeant contra. All the precedents in *Off. Br.* are thus. 2 *Keb.* 341, 436. *Nichil habent. Exacti non comparuer.* *Nulla habent bona. Sed per curiam,* The difference lies between the affirmative and the negative. *Et semble* this return is ill. *Sed adjournatur.* And *Paf.* 6 *Geo.* the return quashed.

Ducissa Hamilton *vers.* Incledon.

ERROR of a judgment in *C. B.* in an action upon the case upon several promises, verdict *pro quer.*, and general errors assigned.

In misericordia, &c. is sufficient in actions against peers.

Strange pro quer. in errore. A peer (and consequently a peeress) cannot be attached, but should be brought in by summons; whereas this declaration runs, that the duchess *attachiata fuit ad respondendum.* *Sed per curiam,* Whether that be right or wrong is not material; for if it be wrong, yet according to the modern resolutions you cannot reverse a judgment by the recital of the writ, but must bring the very process itself before the court.

Recital of a writ not to be argued from.

2. The duchess is put in *misericordia* generally, which ought not to be; the statute of *Magna charta*, c. 14. appoints *quod comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti.* But though it says *per pares suos*, yet I admit that long usage has vested that power in the Judges of the King's courts, who are to be looked on as *pares quoad hoc.* The amercements of the nobility are now reduced to a certainty; a Duke 10 *l.* and an Earl or other Baron 5 *l.* And as to what may be said, that here is an *&c.* which implies an amercement according to law.

To that I answer, that then there is no distinction made between the amercements of Peers and common persons, which Mr. Selden in his treatise of Baronage says ought to be, for his words are, "That in case of amercements of Barons of Parliament upon non-suits or other judgments ending in *misericordia*, there is a special course both for the sum and the way of ascertaining it, which differs from the amercements of common persons." And then he goes on and gives you the roll in *Edward* the Second's time, where a writ was directed to the justices *de C. B.* that they should not amerce the abbot of *Crowland* *tanquam baro*, for that he held not *per baroniam*. Now there was no need of this, if he might be generally amerced. And my Lord Coke, 2 *Inst.* 28. says, if a nobleman and a common person join in an action, they shall be severally amerced, the nobleman at 100 s. and the common person according to the statute. So is *Bro. Amercement* 2. *Sed per curiam*, It is the constant way, to say in *misericordia*, &c. which implies every thing, and we cannot overturn the precedents. Judgment affirmed.

Beacon *vers.* Peck.

If there be a *nichil* returned as to the lands, there may be a *ca. fa.* after an *elegit*.

THE plaintiff took out an *elegit*, and by virtue thereof levied part of the debt upon the goods, and after a *nichil* returned as to the lands, sues out a *capias ad satisfaciendum*, and arrests the body of the defendant.

19 H. 6. 4. b.
Dy. 162. b.
15 H. 7. 15.
1 Roll. Abr.
601. pl. 4.
2 *Inst.* 395.
3 Co. 11, 12.
F. N. B. 265.
b.
Hob. 56.
13 H. 4. 1. b.

It was moved to quash the *capias ad satisfaciendum*, because the plaintiff by taking out an *elegit*, had waived any other execution. And for this all the old cases were cited. But the court held the *capias ad satisfaciendum* was regular, for there being a *nichil* returned as to the lands, the *elegit* was but in the nature of a common *fieri facias*, upon which if part be levied, the plaintiff may afterwards have a *capias ad satisfaciendum*. The election is not compleat, unless the plaintiff has some benefit from the land; for the taking out the writ is not an actual election, but only in order to an election; and if there be no lands, there is nothing to chuse, and consequently no election.

Stibbs vers. Clough.

Trin. 5 Geo. rot. 368.

DEBT upon a bond, conditioned to perform articles, which upon the plea appear to be an agreement, that the plaintiff shall furnish the defendant with ale and beer to be sold in his house at such prices, and that he should take it of no body else, but might be at liberty to take any other liquors (malt liquors only excepted): and what should not be paid for at breaking up the trade, and were undrawn, should be taken back. And then the defendant pleads performance. The plaintiff replies, that by the same articles it was further agreed, that what should be drawn should be paid for, and that there was such a quantity of liquors unpaid for. *Demurrer inde*; and

The breach must be as particular as the covenant, and where a deed is pleaded the plaintiff cannot reply new matter in the deed, but must set it out upon *oyer*.

Forke pro defendente. By the breach it does not appear, the liquors unpaid for were malt liquors; and as other sorts are mentioned, the plaintiff should have been more particular, especially in the case of a bond, where he is to subject the defendant to a penalty.

Et per curiam. The replication is likewise ill, for the plaintiff can only allege new matter in the articles by setting them out upon *oyer*. The case of the *African Company v. Mason* was a bond, conditioned, reciting that the defendant was their receiver at *Bristol*, if therefore he do well and truly account for all sums by him received, then the bond to be void: the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition, to be only about transactions of a particular nature, the general assignment of the breach was held ill. So is 2 *Saund.* 411. *Judicium pro defendente.*

Peele vers. Com' Carliol'.

DEBT on bond, conditioned to resign a benefice. And the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established, even in a court of equity. And also where the condition is general, and not barely to resign to a particular person. 2 *Chan. Rep.* 398. 2 *Keb.* 446. 1 *Sid.* 387. *Hutt.* 111.

Bond of resignation good.

Gyle *vers.* Ellis.

Where the action is against the original lessee, the breach need not extend to assigns.

COVENANT that the defendant, his heirs and assigns, shall every year during the term plant eight crab stocks, and the breach is, that the defendant such a year neglected to do it.

Wearg objected, that the breach should have been in the disjunctive, that neither he nor his assigns did it. *Plow.* 199. *Cro. El.* 348. *Bridg.* 46. *A.* covenanted, that he, his executors or assigns, would do such an act, and the breach was, that the executor did not do it, without taking notice of the testator, and held ill. And the difference is between doing a thing *to* a man and his assigns, and *by* a man and his assigns.

Probyn contra. The action is against the original lessee, so there can be no assignment intended: we knew nothing of any; if there be one, it lies in their privity, and therefore they should defend themselves by shewing one. The case in *Cro. El.* is not *ad rem*, for there the breach was in the conjunctive instead of the disjunctive, and that was the reason of its being held ill.

Et per curiam, We must intend the estate continues in him, till the contrary appears; and therefore the declaration is well enough, being against the lessee himself. *Qui facit per alium facit per se*; and therefore if the assigns have done it, the breach that the lessee himself has not, is false. There is as much necessity to say, an heir did not perform the covenant, when the action is against the ancestor. *Judicium pro quer'.*

Coleman *vers.* Earle.

Willielmo for *Waltero* in the *assumpsit* vitiates not, if there be no *William* named before.

THE plaintiff's name was *Walter*, and on error *Branthwayte* Serjeant objected, that one of the *assumpsits* was laid *praefat' Willielmo*, and the damages are intire.

Reeve contra. There being no *William* mentioned in the record before, it must be rejected as insensible; and then there are other parts of the count, which shew the *assumpsit* could be only to the plaintiff. In *Roe v. Gatehouse*, *Hil.* 8 *W.* 3. *Salk.* 663. it was *super se assumpsit*, without saying who, and held well enough. So *Trin.* 2 *Ann.* in *B. R.* *Sbere v. Brown*. The declaration run, that in consideration the plaintiff had delivered goods to the defendant; *super se assumpsit*, to pay for them; without saying who promised; and

and yet this was taken to be good. *Trin. 5 Ann. Atkorp v. Gosling.* In an action against a carrier, it was laid, that in consideration the plaintiff had delivered goods to the defendant to carry, *ipse praed'* (the plaintiff instead of the defendant) *super se assumpsit*, and that was resolved to be well enough. *Pasch. 4 Ann. Assumpsit* by an executor, who declared, that in consideration *the testator* had carried goods, he the defendant promised to pay *quantum praedictus Thomas* (who was the executor) deserved; and though he ought to have said *quantum* the testator deserved, yet the count was adjudged sufficient. If these cases should not be answers, then I rely on 16 & 17 Car. 2. which cures the mistake of the plaintiff's or defendant's name, when they are before rightly mentioned in the record.

Sed per curiam: Let us not pray in aid of the statute, when the thing is well enough of itself. So is 1 Mod. 42. Salk. 24. And therefore the judgment must be affirmed.

Aleberry *vers.* Walby. Hil. 5 Geo. rot. 206.

ERROR of a judgment *in C. B.* in an action of covenant brought upon a lease for years; and the breach assigned in non-payment of rent: judgment by default, *inquiratur de dampnis*: general errors, and want of an original, and returned accordingly: another original alleged by defendant of another term, and a *certiorari* prayed, and one returned and set forth; and some little variances; and *in nullo est erratum* pleaded.

In what
actions baron
and feme may
join.

Strange pro quer' in errore. This is an action by a man and his wife and a third person, who is tenant in common with the wife, upon a lease at will made during the coverture, of lands which are the inheritance of the wife and that third person, for arrears of rent incurred during the coverture; and therefore the wife cannot join in such an action, for 1 Sid. 224. she shall join in no action, but what will survive to her, or her administrator after the death of the husband: now the husband is fully intitled to the rent incurred during the coverture, and if she dies, he, and not her administrator, shall have those arrears. *Co. Litt. 351. a. 1 Roll. Abr. 345. H. 1.*

As this is but a lease at will, it is not within the statute 32 H. 8. c. 28. which requires, that the wife should be made a party to leases of her land, and the reservation be to her and her heirs; for that statute extends only to leases for life or years. And though the reservation here be to her as well as to the rest, yet that will make no difference; for during his life, it is in the eye of the law a reservation

vation only to the husband ; and they are not to declare upon it according to the fact, but according to the operation of law. If one jointenant pleads, that the other *concessit* to him, it is ill ; for it should have been pleaded as a release, that being the only proper conveyance between jointenants. 2 *Saund.* 97. 2 *Ven.* 141, 260, 266. In 3 *Lev.* 290. that was pleaded as a grant, which could enture only as a covenant to stand seised ; and it was held ill. So is *Salk.* 8, 274.

Sed per curiam : The husband and wife may, or may not, join in this action at their election, as where a bond is to both of them. 4 *H.* 5. 6. *Cro. Jac.* 77. *Cro. Eliz.* 61.

In covenant the plaintiff need not set out a title, for *quod cum dimississet* is enough, and if he does it wrong it is surplusage.

2. *Exception.* To the manner wherein the plaintiffs have deduced their title. Under this head we are to lay the husband out of the case, and consider how the wife and the other persons have made themselves out to be tenants in common. They say, that one *James Scrape* was seised in fee of the demised premises, and that upon his death the same descended to him and her as cousins and heirs. Now the court cannot take a man and a woman, without more shewing, to be coheirs. The fact I suppose is, that the mothers of these two were sisters, who both died in the life of the ancestor, and so the plaintiffs, who are the respective issues of those parceners, stand now in the place of their mothers, and claim what would otherwise have belonged to them, in case they had survived *Scrape*. But then in deducing their title, they ought to have shewn all this ; for they must claim through their mothers to make themselves heirs to him that last died seised ; for according to the case of *Collingwood* and *Pace*, it is a mediate and not an immediate descent ; they must claim *mediante matre*. All the precedents of *formedons* by cousin and heir shew how he became so, and in *Salk.* 355. it was held, that he who sues as heir, must shew *coment* heir, and it is not sufficient for him to say generally, that he is heir.

1 *Ven.* 413.

It will perhaps be said, that this being an action of covenant, the plaintiffs were not obliged to set out any title, but might have begun generally, *quod cum dimississent*. I admit they might, and then the court would have intended they had a title to make this lease, when the other accepted it. But when the plaintiffs undertake to set out a title, and fail in doing it ; there is no room in that case for intendment, for the court will never intend the plaintiffs have a better title than they themselves rely upon. Every man is supposed to make the best of his own case, and upon that ground the rule is, that every man's plea shall be taken most strongly against himself. *Plowd.* 104. a. 202. b. And in many cases what a man does unnecessarily shall vitiate his proceedings, as where he misrecites a publick statute. 4 *Co.* 48. a. *Plowd.* 77. b.

Sed per curiam: The introduction by setting out the descent is nothing to the purpose here, where they declare upon their own demise, and therefore there can be nothing in that exception.

3. The breach is not well assigned: the covenant is in the disjunctive, *to pay or cause to be paid to them or any of them*; but as to part of the time the breach is only that he did not pay, and as to the other part, that he did not pay to them, whereas he may have caused the rent to be paid to one of them, which is a performance. And there being two ways, the breach ought to have been so large, as to exclude both ways, by either of which the act might be done. *21 Ed. 3. 29. b.* And since the plaintiffs have in one breach obviated one part of the objection, and in the other the other part; this looks as if they were conscious to themselves that there was some variation in the fact: that where they say generally we did not pay, yet we may have caused to be paid; and that where they charge a non-payment to all, yet there might be a payment to one of them, which is enough within the words of the covenant.

In a covenant to pay or cause to be paid, the breach may be general that he did not pay.

Sed per curiam: He that causes to pay, pays; and if you have paid the money to one of them, you may plead it in your discharge.

Then I moved to quash the writ of error, which describes the Variance, suit to be between the plaintiff and one *John Aleberry alias dict' John Aleberry of Waltham abbey*, and the *alias dict'* is *abby* in the record, one is *b, e, y*, and the other *b, y*. This variance is in the *alias dict'*, where the court has always obliged the party to describe the specialty *literatim*. And in these cases you never go by the sound, because the party has something else to guide him; and if he mistakes, it is to be imputed to his own negligence. In a plea of misnomer indeed it is otherwise, because there the party has nothing to go by but the sound.

Mich. 13 Ann. the writ was *Crawley*, and the record *Crowley*. *12 Aff. pl. 2.* *Annsly* and *Anesly*. *Pasch. 4 Geo.* *Shartless* and *Sharpless*. *Bro. Variance 26.* *Baxster* with an (*f*) and *Baxter* without an (*f*). *Salk. 264.* *Giggeer* and *Giggure*. All these were held to be fatal variances in the description of a record, and yet nobody will say they might have been taken advantage of by plea of misnomer in abatement. And I apprehend the reason of all these cases is what is laid down in *Dr. Drake's case*; that in all cases *Salk. 660.* where the party has any record or specialty by which he may make an exact description, in such case the most minute variance is fatal. And Mr. Justice *Powys*, who held with the exception, about *not* and *Ante 201.* *nor*, said, that if the court once gave into solutions of those variances, they

they would never know where to stop; but being once out at sea, would find it very difficult to steer into harbour again.

I must admit, that this writ of error would have been well enough, if the *alias dict'* had been left out, because it is sufficient if the record answers the description; and though it would contain more, yet that excess must of necessity imply a fulness, and if there be a full answer to the description, it is as much as is required. But though it would be good in such a case, yet I have often heard it said in this court, that though it is not requisite to insert the addition, yet any variance whatsoever, if the party will take upon him to be more than ordinarily particular, is fatal; for then the record does not answer the description, as it does where the writ of error makes a total omission of the addition.

Sed per curiam: The cases cited are of variances in the name of the party, which is more considerable than the place of his residence. These words are both properly used, some spell it *abbey* and some *abby*; and if there be occasion, we may take the latter as an abbreviation of the former. *Per curiam*: The record is well removed, and the judgment must be affirmed.

Between the Parishes of Little Bitham and Somerby.

Order reversed, final to parties; confirmed, to every body. Salk. 492, 524, 527.

A. Is sent by order of two justices to *B.* as the place of his last legal settlement. *B.* appeals, and the order is confirmed. Soon after, without stating that *A.* had gained any new settlement, *B.* sends him to *C.* *Et per curiam*: An order of reversal is final only between the two parishes: but if it be confirmed, it is final as to all the world; and therefore no new settlement appearing, the order of removal from *B.* must be quashed.

Hayman *vers.* Rogers.

An inconsistent *postea* under a *scilicet*, rejected.

*I*N covenant, the plaintiff declared upon articles dated 30 Sept. 5 Geo. (which is 1718,) not to set up a trade of a baker, *a die datorum articulorum* for so many years, and then says, that *postea scilicet* 1 May 1718, (which is four months before making the articles) the defendant did exercise the trade in that place. And after verdict for the plaintiff, it was moved in arrest of judgment, that the time in the breach was no part of that to which the restraint goes, and therefore the plaintiff has no cause of action. *Show.* 8.

Darnall

Darnall Serjeant contra. The verdict cures it; for we could not have recovered without proof of an exercising after the date of the articles. *Per curiam:* Where that which comes under a *scilicet* is consistent with what went before, it is always looked on as an averment; but if it be inconsistent, we reject it. As in the common case in ejectment, where the lease is *a die dat'*, and the entry and expulsion laid the same day. We will reject the 1 May 1718, and then the case is that he covenanted the 30 Sept. *et postea* he committed the breach. *Judicium pro quer'.*

Scilicet, where an averment, and where not.

Brewer vers. Turner.

REEVE moved to quash the writ of error, because the judgment is against two defendants, and so described in the writ of error, but then it is laid to be only *ad grave damnum* of one of them. Now the persons who are named under the *ad grave damnum* are they, and only they, who bring the writ of error. So that the case is no more than that one defendant brings a writ of error of a judgment against two, whereas all ought to join. 6 Co. *Ruddock's case.*

Qu. Whether one defendant may bring error of a judgment against two.

Strange contra. The first answer I would give to this objection is, that the ground and foundation of quashing writs of error is for some variance appearing between them and the record, of which there is none in this case. The three requisites in a writ of error are, to denote the court where, the parties between whom, and the subject matter of the suit; all which are truly described in this writ of error. And then the saying it is *ad grave damnum* of one only, when it appears to be a judgment against two, can never be construed to be a variance; for if it be to the damage of both, it must be to the damage of each, and so the record answers the description. Whether therefore when there is no variance, the court will quash this writ of error, or not rather put the party to demur to our assignment of errors, that I must submit to the court.

But waiving that, I take the writ of error to be well enough as it now stands. The fact is, that one of the defendants died before bringing the writ of error; but as that does not appear in the cause, I admit the case must be taken to be, that one defendant alone brings a writ of error of a judgment against himself and another, and this I apprehend to be well enough.

It will not be denied, but that as this judgment is joint, if there be error in it as to one defendant only, yet the whole must be re-

versed. 1 *Roll. Abr.* 775. *E.* 2. *Cro. Jac.* 303. *Sti.* 121. And this may be done at the instance of that defendant only, who can say it is erroneous. 5 *Ed.* 4. 7. *a.* is express, that if judgment in trespass be given against three, one of whom was dead, the other shall not have a writ of error of that judgment, but only the executor of the party deceased; and yet the costs being joint, the judgment must be reversed *in toto*. *Bro. Joinder in action* 77. In trespass against two, who are condemned in an erroneous judgment, it is said, they may join or sever in a writ of error at their election.

There is but one precedent, which comes up to this case, and that is in *Hearn's Pleader* 466. in the book, but the right page is 370. and it is thus: "Because in the record and proceedings of a fine between *W. B. now deceased and J. V. plaintiffs* and *J. L. deforçant* error hath intervened, to the great damage of *W. B. son and heir of the said W. B.*" So that the heir alone brings a writ of error of a judgment against his ancestor and another, and assigns that for error which vacates the fine *in toto*. And if one plaintiff, who voluntarily joins himself with another, may when he pleases desert him; *a fortiori* may defendants sever in their writs of error, for they are not joined together at their own election, but at the will of the plaintiff. And agreeable to this entry is *Cro. Eliz.* 115.

If the defendants may not sever in their writs of error, the inconvenience will be great, that the plaintiff may if he pleases join me with a defendant who is under his own power, and will never consent to bring a writ of error; and then I shall be remediless, be the judgment never so erroneous. For as to what may be said, that summons and severance lies; that is only after a writ of error brought. If two bring a writ of error, and upon the *scire facias quare executio non*, one only appears: there summons and severance lies. *Yelv.* 4. And upon that the judgment is, that one alone shall prosecute that writ, which was brought jointly by them both. But if it be not brought by both, there can be no summons and severance; and therefore if one refuses to join, the other ought to be at liberty to bring it alone. And there will be no inconvenience to the plaintiff, for his judgment can but be reversed; and if it be erroneous, what matter is it to him whether it be reversed at the instance of all the defendants, or of one of them only?

Curia. If it had any where appeared, that the other defendant was dead; there is no doubt but this defendant alone without the executor of the other might bring a writ of error: but as nothing of that appears, and the judgment is joint; it should seem as if all must be mentioned under the *ad grave damnum*. And to this purpose

pose was the case of *Pennoir v. Brace tempore W. 3. 5 Mod. 338.*
Salk. 319. 5 Mod. 16, 69.

The writ of error was quashed, unless cause next term.

N. B. Hil. 6 Geo. the Chief Justice being in court, I stirred it again, and they all held the writ of error bad: so it was quashed, and I drew a new one.

Brocas vers. Civit' London.

P*ER curiam*: It was settled in Sir *Peter Delme's* case, and has Practice. always been the course of the court, that when either party will suggest any special matter about awarding the *venire* out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a *nient dedire*.

Newell vers. Pidgeon

P*ER curiam*: If the plaintiff be nonsuit, and a judgment against *Error sur* him for costs, error lies in *Camera Scaccarii. 1 Roll. Abr. nonsuit.*
 744. F.

Biron vers. Philips.

P*ER curiam*: There must be the same notice of executing a Practice. *scire fieri* inquiry, as a common writ of inquiry.

Scotton vers. Scotton. In Canc'.

A Daughter having married without her father's consent, he gave her no portion, but made his will, and thereby gave her 50*l.* to be lent out for her, and she to have the use of it. Her husband being informed of this legacy, applies to the father for the money presently, who gave it him, and took a receipt for it in lieu of her portion, and of the legacy given by his will. The father died without altering his will, upon which his daughter and her husband sue the administrator in the spiritual court for the legacy, and the administrator brings his bill in this court.



Vernon

Vernon pro quer' quoted *Birkinhead v. Birkinhead* in lord Eger-ton's time, where the father having by will given 1500 l. a-piece to his three daughters, afterwards married one of them, and gave 1500 l. portion, and then died without altering his will; and adjudged the portion a satisfaction of the legacy.

Master of the rolls. Whether this be a case relievable in the spiritual court I am not certain: I rather think this receipt is not pleadable there, being a release of a legacy before it is due. But in this court it amounts to an agreement of the son-in-law, to discharge the legacy. Besides the precedents here run all this way, that a child's legacy is satisfied by a provision subsequent to the will. Let the proceedings in the spiritual court be stayed.

Countess dowager of Mountague *vers.* Maxwell. In Canc'.

What writing is sufficient to bring a case out of the statute of frauds and perjuries. S. C. 1 Will. 618.

THE plaintiff married the defendant without any previous settlement of her estate, which was a very considerable personal estate. Quarrels happened between them soon after the marriage, and she exhibited her bill here, to oblige him to settle her own estate to her separate use: setting forth, that upon his addressing her, she insisted on having the entire disposal of her own estate, and drew up a short writing with her own hand to that purpose; that he promised to sign it, but put her off on pretence of advising with counsel, and having writings more at large prepared; that she frequently demanded of him to execute such writings, which he constantly promised, as soon as finished by counsel, but delayed it till she married him. That after marriage she pressed him by letter to perform his promise, and he answered her by another letter, that he thought it very reasonable she should have the disposal of her own estate, that he never intended the contrary, but that she should command her own fortune as she pleased.

29 Car. 2. c. 3.

The defendant denied he signed any such agreement in writing, and as to any *parol* promise he pleaded the statute of frauds and perjuries.

It was insisted on for the plaintiff, that the court frequently compels the execution of promises not solemnized according to that statute, where fraud and trick appear, and where part of the agreement is carried into execution, as it is here by the marriage, which was the consideration of that promise. But *Parker* Lord Chancellor allowed the plea, and said this was only a breach of promise, which is a sort of injury that this court does not take cognizance

nizance of. If there had been fraud (as if pretending to execute a real deed of settlement he had imposed another on her) this might have made it a proper case for equity; but here is nothing of any such deceit: she marries him on his word and promise, without writing, and that is the very case the statute intended. To say therefore the agreement is to be executed in this court, because performed in part by the marriage, is to break the very words and intention of the statute, which has put this very case, and says it shall not be binding.

The plaintiff afterwards amended her bill by a further charge, that in order to induce her to marry him without a previous settlement, and to secure the performance of his promise in executing it afterwards, he promised to take the sacrament on it, and that he did take the sacrament on the marriage accordingly. That after the marriage he wrote a letter, wherein he promised to make such settlement, and that he was ready to sign the writings according to her desire.

To this he confesses he did take the sacrament on the marriage, but says he did it only in compliance with a custom established in the *Romish* church (of which he was a member) of receiving the sacrament on their marriages, and not to give any sanction to this pretended agreement. And as to the letter, he doth not remember the particulars, but if he has wrote any thing concerning his readiness to sign any writings, it only related to some proposals he had made of settling a sum of 1500 *l.* on her, and which he did soon after sign. He then pleads the statute of frauds and perjuries again.

Lord Chancellor. The case is very much altered now, from what it was at first. Then it stood purely on the parol promise before marriage, upon which there was no colour to relieve the plaintiff. But such parol promise on marriage is sufficient consideration, to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage. Now here is great evidence of such a promise made in writing after marriage; he doth not deny his writing, that he was ready to execute the writings as she desired; but avoids it by saying, they referred to proposals of settling 1500 *l.* which is impossible, because it appears she never desired any such settlement. And though he says he has signed that settlement, it doth not appear when he did it; and I am very jealous he did it since the amended bill. His answer to the charge of receiving the sacrament in confirmation of his promise, is not at all satisfactory. He could have no occasion to promise receiving the sacrament, but on that account; and though he might

receive it in compliance with the custom of his church, yet that is very consistent with his laying hold of that solemn act of devotion, to testify his sincerity. Therefore let the plea stand for an answer.

Harrison *vers.* Buckle. In Canc'.

If a legacy be devised payable at 21, with interest in the mean time, and the infant dies, his representative may sue for it immediately.

A. devises to his daughter 1000 *l.* payable at her age of twenty-one or day of marriage, and 1500 *l.* to his son payable at the age of twenty-four, and a certain maintenance in the mean time; and all his real estate he devises to trustees, to raise by sale or otherwise sufficient to discharge his debts and legacies, if the personal estate should fall short. *A.* dies; the son dies under age; the daughter marries the defendant, and they join in a suit in the spiritual court against the trustees, who are also executors, for her own legacy of 1000 *l.* and as representative of her brother for his 1500 *l.*

The executors exhibit their bill here, to stop the proceedings in the spiritual court, and compel the husband to settle the legacy on the wife. The defendant insists on his right to the legacy, independent of any settlement, he being now in a proper court for the recovery of it without the assistance of this court; and that he is intitled to the 1500 *l.* immediately, though the son was not to have it till his age of twenty-four.

Upon this two questions arose. 1. Whether this court could interpose on behalf of the wife, and secure the legacy for a settlement on her. 2. Whether the son's legacy of 1500 *l.* is not extinguished by his death before it became due. Or if it subsists, whether his representative is intitled to it sooner than he himself would have been, if he had lived.

As to this last point Mr. *Vernon* said, There had been cases both ways, but were reconcileable on this distinction; where interest of the legacy payable at a certain age has been given to the infant in the mean time, there the money has been held payable to the representative immediately: but where no interest has been given, the money was not payable till the time the legatee would have arrived at that age. The present case, he said, was a sort of middle way between both: no interest, but some present advantage, *viz.* maintenance is given.

Master of the rolls. The 1500 *l.* given is first and principally a charge on the personal estate, and is an absolute legacy out of that: the real estate is only devised in aid of the personal, nor is it to be

fold

fold directly, but only at the discretion of his trustees and executors, to be disposed of so far as the debts and legacies shall require. As this then is not a direct legacy out of the real estate, the death of the party before it became payable shall not extinguish it. And this differs from *Pawlet's case*, 2 *Ven.* 366. where the money was an immediate charge on the land, and to be raised out of that without any regard to the personal estate. The son's representative being thus intitled, the next question is as to the time. Had this 1500 *l.* carried interest immediately to the infant, though the time of payment of the principal was deferred, yet on his death his representative would have had a right to it immediately: not that he would have been in a better condition than the infant was, since the delay of payment was only by way of caution, but with equal benefit to the legatee. And the executor is not hurt, because on payment of the money the interest ceases. The appointment of maintenance is said to be equivalent to the giving interest, but I think not; interest carries the whole benefit of the legacy, but maintenance is something distinct and independant of it. It is a decent provision during minority, and bounded, not by the profit of the money, but the necessities of his sustenance and education.

As to the wife's legacy of 1000 *l.* the bill is of an unusual nature. It has indeed been the common course of this court, to oblige a husband who comes hither in right of his wife for a sum of money, to make a proper settlement on her, before it is given him; and that, not only in the case of trust money, which can be recovered no where else, but in the case of legacies too. Though I must say, had this been *res integra*, I should be very cautious, how I went so far as legacies, because there is a proper court elsewhere for the recovery of them: they originally belonged to the spiritual court only, and the sole ground of this court's intermeddling is, the discovery of the testator's personal estate. But the present case is different: the persons liable to pay the legacies are plaintiffs here, and not the husband; and whether they would not have been safe in paying the legacy, if they had suffered the spiritual court to go on to sentence, I will not say.

Where the court will oblige the husband to settle what he sues for of the wife's upon her.

This seems to have something of the nature of an interpleading bill, wherein the executors call upon the husband and wife to interplead concerning their several rights; the husband to the money absolutely, and the wife to a proper provision to be secured for herself. And then it will be like the common case, of a husband's coming into this court to have a legacy against his wife. And I have observed a strong inclination in Lord *Cowper's* time, to do right to the wife. Since legatary causes are now become part of the
juris-

jurisdiction of this court, I think this is fit to be considered. The wife is not here, therefore let her attend, to acquaint us what provision she is willing to accept.

Hagshaw *vers.* Yates. In Canc'.

A subsequent title which is both legal and equitable, destroys a prior title in equity only.

PER Parker Lord Chancellor. Where a legal estate and equity meet in the same person, they shall destroy a prior title which is only equitable. And where the inheritance of lands mortgaged for a term is conveyed by a defeasible but equitable title, and afterwards conveyed to another by a legal and equitable title; the latter shall have the benefit of the equity of redemption.

J.C.

2 Vern. 764.
1 Will. Rep.
496.
Bond to refund part of portion, set aside.

Turton *vers.* Benson. In Canc'.

THE bill was to be relieved against a bond obtained in fraud of a marriage settlement: and the case was thus. The plaintiff being a young man in 1710. made his addressee to one Mrs. Benson: the plaintiff's mother and uncle were concerned in transacting it for him, and on 29 June 1710. marriage articles were executed, whereby Mr. Benson was to give 3000*l.* as a portion with his daughter, and Mrs. Turton was to part with 300*l.* *per annum* out of her jointure, to make a settlement on the marriage: but secretly, without the privity of the mother or uncle, the plaintiff gave bond to refund 1000*l.* part of the portion, to Benson at the end of seven years; and soon after, the marriage took effect. In 1713 Benson deposited this bond in the hands of Sir Theodore Janssen as a security for a debt, but made no actual assignment. In 1714 Benson died, and his wife the defendant took out administration; but his debts being beyond the value of his estate, the creditors came to an agreement amongst themselves and with her, whereby Sir Theodore's whole debt was to be paid, and all Benson's effects to be turned into money, and divided amongst the rest of the creditors, and the plaintiff's bond, and all the debts to be got in by the administratrix: and creditors on simple contract to be in equal degree with those on specialties. During this transaction one of the chief creditors acquainted the plaintiff with their designs, and that his bond was to be assigned to them; who answered, that if Mrs. Benson was to have the benefit of it, he would never pay it; but if they were, he would not dispute it with them. In this condition the bond stood in 1715. when the plaintiff brought his bill against the administratrix to have it delivered up. When that cause was at hearing, the creditors bring a bill against the plaintiff and administratrix to discover collusion. Both causes came on before the Master of

of the Rolls, who decreed for Mr. *Turton*, and now they came by appeal before the Chancellor.

The questions were, whether this bond was void in its original creation; and if so, whether it has not been since made good by some subsequent matter, either by its being transferred for some valuable consideration, or by the promise of the plaintiff not to dispute it.

As to the first, it was said by the counsel for the plaintiff, that it was a sort of first principle, and settled rule in this court, to make void all contracts of this nature, whereby marriage articles, settled by the consent of all parties concerned, are any ways defeated by the private agreements of some of them. And several cases were cited, to establish this rule. *Salk.* 156. where it was laid down as a rule, that a son, without the privity of the father, or parent treating the match, gives bond to refund part of the portion, it is void. *Ibid.* 158.

Sir R. *Raymond* cited *Redman v. Redman* in 1685. in this court, ^{1 Vern. 348.} where on a treaty of marriage the friends of the lady insisted on the husband's discharging all his debts before the marriage. There was one bond which his brother agreed to pay for him, but underhand with the privity of the lady, who was afraid of losing the match, took a counter security of the husband; and the marriage took effect. Afterwards the brother paid the money on the bond, the husband died, and he sued the counter security against the widow, who had taken administration. She brought her bill, and though privy to the fraud, was relieved; because it was done originally to defeat a marriage agreement.

So in the case of *Gale v. Lindo*. On a treaty of marriage the ^{1 Vern. 475.} fortune of the young woman not being sufficient for the husband, she prevails on her brother to make up the deficiency by a bond of his; but privately agrees with him, that no use should be made of it. They were married accordingly; and the husband dying, she took out administration, and put the bond in suit: the brother sues here for relief, but denied because the agreement was fraudulent.

Mr. *Vernon* quoted the following cases to the same purpose. *Lamley v. Hamond*, *Mich.* 1714. a mother for the advancement of ^{2 Vern. 466,} her son in marriage agreed to part with her jointure; the son at ^{499.} the same time had a leasehold estate of his own, which he privately contracted to assign over to her in consideration of what she was to settle upon him: after the marriage the son died, and his representative recovered this leasehold estate out of her hands by a decree

of this court, because there was no mention made of that assignment on the marriage treaty.

1 Vern. 240.

Peyton v. Bladwell, 9 March 1694. Mr. *Bladwell* on the marriage of his nephew *Yelverton Peyton* with the daughter of Sir *John Roberts*, agreed to settle an estate of 200 *l. per annum* on them for a jointure, and after his death to settle a further estate of 100 *l. per annum* on him and his heirs. After the marriage it was discovered, that there was a private agreement between him and his nephew, that he should demise the first estate back again to *Bladwell* at 150 *l. per annum* rent; and as to the reversionary estate, that he should release that; and such demise and release were executed accordingly: after the nephew's death his wife and Sir *John Roberts* sue in this court to set aside this private agreement, and had a decree, whereby *Bladwell* was to account for the profits of the estate in possession at the rate of 200 *l. per annum* from the time of the demise, and to settle the other estate of 100 *l. per annum* on the heirs of *Peyton*, to commence after his own death. *Sloan v. Fowler*. On the marriage of *Fowler's* son with *Sloan's* daughter, *Fowler* by articles was to make a settlement, and to have the portion to himself; but he told his son, the portion was not sufficient to pay younger children's fortunes, and so got a bond from his son for a sum of money beyond the wife's fortune: this bond came afterwards into the court of Chancery, and was set aside, because it was taken without the privity of the wife's relations.

As to the second question, whether the creditors as purchasers of this bond for a valuable consideration are not in a better condition than *Benson* was.

2 Vern. 564.

For the plaintiff it was said, here was really no assignment at all; it was only deposited in Sir *Theodore's* hands as a security, but not designed to transfer the interest: or if there had been an assignment, that gives no property or right, a bond being a *chose* in action not being assignable but in Equity, and then it must be attended in the assignee's hands with all the circumstances of equity with which the first obligee held it. If therefore it was void in equity in its original creation, it cannot be made good by any equitable conveyance: the creditors can have no better right than *Benson* had: their right is only to his estate, which if he possessed unlawfully, can be no better in their hands. So it is in case of bankrupts. Creditors under the assignment shall have no better right to the effects than the bankrupt himself had. *Taylor v. Wheeler*. Plaintiff had lent money on a copyhold estate, and a surrender was made accordingly: by the custom of the manor surrenders are void unless presented in a year, and this surrender was neglected to be presented: afterwards, and before

before the money was paid, *Wheeler* the debtor became bankrupt, and a commission was taken out, and this copyhold *inter alia* assigned: the assignees get admittance, and the mortgagee sues here for relief: they urge in favour of the assignees, that this copyhold continued in the bankrupt till his bankruptcy: the only thing that stuck with Lord *Cowper* was, that the plaintiff by his suffering him to continue in possession, and not presenting the surrender by which the mortgage might have been discovered, induced others on the credit of that estate to trust him, and now the assignees have both law and equity of their side; but yet the plaintiff was relieved on that maxim, that the creditors shall be in no better condition than the bankrupt himself was.

And in these cases where fraud has been purged by a legal conveyance on valuable consideration without notice, yet the persons that conveyed with notice of the fraud have been obliged to make it good. In the case of *Ferrers v. Cherry*, *Cherry* having notice of a ^{2 Vern. 384.} settlement wherein the father was only tenant for life in equity, accepts a conveyance in fee from him; and afterwards sold it to purchasers without notice: on a bill by the son for relief, the purchasers having law and equity on their side had no decree against them, but the court went so far as to order *Cherry* to answer for the fraud. Another case was *Bovey v. Smith*. Trustees had sold ^{1 Vern. 60.} without notice of the trust in the purchaser; he levied a fine, and non-claim for five years: sixteen years after, the trustees purchase back this estate for a valuable consideration: this appeared to the court on a bill by the *cestuy que trust*; and though the fraud was purged, yet the court decreed the estate became again chargeable in their hands, and the lands were decreed to the plaintiff accordingly.

As to the plaintiff's promise, it was said to be rather a compliment than a promise: or if it was one, yet there was no consideration for it.

For the defendant Serjeant *Chefhyre* and Mr. *Talbot*, could not dispute the general rule of discharging contracts made in fraud of marriage settlements; but said the plaintiff ought not to come here, because himself was not only not defrauded, but was even a party to the fraud against the mother.

The second question was chiefly insisted on. They said the original fraud was purged by the subsequent conveyance for valuable consideration, and likened it to the case of *Prodgers v. Langham*, ^{1 Sid. 134.} where agreed *per curiam*, That though a deed be fraudulent in its creation, and voidable by a purchaser: yet it may be made good by matter *ex post facto*; as feoffee by covin makes a feoffment

feoffment for valuable consideration, the second feoffee has a good title. So in the case of *Ellis v. Warns*, *Cro. Jac.* 32. In debt upon a bond, the defendant pleads an usurious contract between himself and one *A.* by which he became bound to the plaintiff for a debt he owed *A.* and which *A.* owed the plaintiff; the plaintiff replies a just debt without any privity of the usurious contract between him and *A.* and on demurrer held a good replication.

Sarrot v. Fielding in Lord Somers's time. *Sarrot* was defired by one *Dod* in the country to draw a bill for him on his correspondent in town, payable to *Dod* or order: he did so, but insisted on the payment of the money before the delivery of the bill, but by reason of a hurry of business then in the shop it was neglected, and the bill was sent to town without the plaintiff's receiving any money for it: the defendant purchased it, and sued the plaintiff at law: he applied here for relief, because he had never been paid for it; but Lord Somers dismissed the bill.

The promise of the plaintiff was said not to be *nudum pactum*, because though he gained nothing by it, yet the creditors parted with some of their right, for they consented to admit simple contract debts upon an equality with bond debts, and to pay Sir *Theodore* his whole debt; and a loss on one side is sufficient to raise an *assumpsit* in the eye of the law.

Lord Chancellor. These private agreements contrary to publick transactions have been always discouraged by this court, even where the parties have come to be eased against their own agreement. And this is so far from distinguishing the present case from others, that it is a circumstance of all the cases that have been cited, and indeed cannot be otherwise, since the settlements against which these private contracts are made, are always for the benefit of the parties to the marriage. The imposition which the court provides against is not upon the person that marries, but on those that are concerned in contracting for him; and I think this case as great a fraud as any that have been mentioned.

The next consideration is, whether the creditors have a better case of it than *Benson*. And first it is clear, that any assignment of *Benson* could not have mended it; that would be to destroy all the power and care of the court in cases of this nature at once, for it is then but to assign over, and nothing can reach it. But he cannot properly assign a bond nor the penalty of it: the sense and meaning of such assignment is, that the assignee shall have all the benefit, which the assignor would have of it, in Equity. Suppose a person assigns a bond that is paid, can the assignee take advantage of that

that bond? But indeed in this case here is no assignment nor any thing like it.

But in the next place, though the party doing the fraud cannot make the bond better; it is another consideration whether the party injured cannot amend it. And I think he may as far as the consideration of it goes; for the bond is not absolutely void; and though the mother is the person injured, yet if the son independent of the marriage will afterwards give a new bond for it, I think it will stand good against him. But there is nothing of that nature in the present case: there is no assignment to the creditors. The composition and agreement amongst the creditors is beneficial to them, without any consideration of this bond. The plaintiff's promise insisted on was without any consideration at all: it does not appear that it induced the agreement, or any thing was done on it, but what would have been done without it. Creditors are indeed intitled to favour, but it is only with regard to the debtor's estate, and not other peoples. I think the decree of the Master of the Rolls is right, and ought to be affirmed, and a perpetual injunction go as to the bond.

South *vers.* Jones.

Intr. Hil. 5 Geo. rot. 396.

THE plaintiff declares, that he being occupier of certain lands in *Downham*, 20th of *August* cut down his grafs and divided it into cocks, and the same day gave notice to the defendant, who was rector, to come and carry away his tithes, which he has not done, *per quod* he lost the use of that part which was under the cocks, from the said 20th of *August* to the 10th of *December* following. The defendant pleads, that for all that time the close where, &c. was surrounded with ditches; and that the ditches, ways and passages were so filled with water, that he could not carry off his tithes. The plaintiff replies, that the ditches, ways and passages were not so; and the defendant demurs.

Parson not obliged to take tithe of grafs the day it is cut, but may let it lie there long enough to make it into hay.

Bootle pro defendente. The declaration is ill, in demanding more damages than the plaintiff ought to go for; he demands from the time of mowing, whereas the parson is not obliged to carry it away then, but it must lie till the parishioner has made it into hay. 1 *Roll. Abr.* 643. X. 1 *Roll. Rep.* 420, 172. We are not after a verdict, where this might be helped by a release, but on a demurrer. So *non constat* the plaintiff will release.

2. The replication is ill in offering to put the whole time in issue, and though we plead to the whole, as we were obliged, yet the fault is in them.

3. The replication is in the copulative, ditches, ways *and* passages, when it should have been in the disjunctive. 2 *Saund.* 205. 3 *Keb.* 162.

C. J. The declaration is ill, for it should have shewn when it was made into hay, and dated the wrong from thence: the replication is well enough in the copulative, because the plea is one intire matter of excuse, and the defendant relies on the whole, and not on each particular's being impassable. *Et per Powys J.* The defendant has not denied the wrong which the plaintiff has laid, but takes upon him to excuse the whole. *Et per Eyre J.* Suppose the tenant will not make it into hay, the parson has no remedy to compel him, but he may do it himself, which it appears he has had time enough for. *Fortescue J.* The issue is well offered, for the passages being over the ditches, (as they must be, because it is said the close was surrounded) it was proper to put it in the copulative. The time laid in declarations is for the most part immaterial, and in trespass it is sufficient if part of the time be according to law, because the jury may apportion it, or the party release it: it is plain, here is a wrong for some part of the time, and I believe the precedents will warrant this declaration. *Hearn* 725. 1 *Brown.* 69, 70. *ulterius.*

Cheshyre Serjeant pro defendente. If the parson is hindred by the act of God, or the party, from taking his tithes; it is an excuse. 1 *Roll. Abr.* 109. pl. 37. Though our plea is double, yet it is a principle in pleading, that if the other does not demur, he must answer the whole plea. Our plea amounts to this. The way, says he, to the close was very bad, and if I could have got through it, yet when I came to the close, it was so encompassed with ditches, and those filled with water, that I could not have got over. The replication puts us to prove both, when either is an excuse, and therefore it is bad. 1 *Saund.* 268.

The declaration likewise is ill, because the defendant cannot be guilty as to all the time; for the court will take notice, that it is impossible to make the grass into hay the same day it is cut: and the parson has of common right time to have it made into hay. If a man reserves a rose, the court so far respects the order of nature, as not to make him pay it in winter.

Reeve contra. The plea is not double, but the defendant relies upon it as making one intire excuse, and therefore we have properly traversed the words of it in our replication.

As to the declaration, it is well enough, for the measure of the damages is not how long the cocks remained after they were cut, but after a reasonable time to remove them; as in an action for beating his servant *per quod servitium amisit*, the smart of the servant is not the measure of the damages, but it is the loss of service which the master recovers for; and what is a reasonable time in this case, is matter of evidence, and must be left to a jury.

But if we do go for too much, they are not proper to make the objection, till they see whether we take damages for an improper time; for as part of this time is well alleged, the jury may sever the time, and give damages accordingly.

Powys J. held with the plaintiff. *Et per Eyre J.* The plea is not double, for the first part is only inducement, but the *git* of it is the ditches being filled with water; so the replication meeting the plea is right. It is certain the defendant let his tithes lie too long, and that is a damage to the parishioner. If a *continuando* is laid in trespass, the jury may give damages as to part of the time only.

Fortescue J. The replication is well enough, for the substance of the plea is but one fact, That he could not come at his tithes; and all the rest is only matter of circumstance. We cannot judge what is a reasonable time, because of the accidents of wind and weather, but that is to be left to a jury; and if the plaintiff had gone only from three or four days after the cutting, I do not see how that could have mended the case upon a demurrer. *Judicium pro querente.*

Hilary Term

6 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.
Sir Littleton Powys, Knt.
Sir Robert Eyre, Knt. } *Justices.*
Sir John Fortescue Aland, Knt.
Nicholas Lechmere, Esquire, Attorney
General.
Sir William Thompson, Knt. Solicitor
General.

Whitehead *vers.* Barber.

Notice of
trial to a
turnkey, good.

P*ER curiam*: Upon conference with the other courts they and we are of opinion, that within the reason of 4 & 5 *W. & M. c. 21.* which appoints, that the delivery of a declaration against a prisoner to the gaoler shall be good, a notice of trial to him is good also, though the defendant has an attorney in one case and not in the other.

Pierce

Pierce *vers.* Hopper.

Int. Pasch' 5 Geo. In B. R. rot. 187.

DEclaration *sur attachment* in prohibition, wherein the plaintiff sets forth, that before the making of the statute 3 Geo. intituled, *An act for the better regulating of pilots for conducting of ships and vessels from Dover, Deal and the isle of Thanet up the rivers of Thames and Medway*, he was publickly examined by the elder and more experienced members of the society of pilots of *Trinity-house* touching his skill and experience in the piloting of ships, and being upon such his examination approved of, he was admitted a member of that society, and was afterwards confirmed accordingly. That after making the statute he was a second time examined, admitted and confirmed, and that according to the direction of that statute his name, age and place of abode were put into the list and hung up at the custom-houses in *London* and *Dover*, by virtue whereof he then became and has ever since continued a member of that society, and as such ought to enjoy the privilege and profits which every member is intitled to. That the exposition of all statutes, the placing and displacing of officers, matters of freehold and all other matters arising within the body of the county, whether by land or by water, belong to the king's courts of record, and not to the courts of admiralty, unless specially provided for by acts of parliament. That the rivers of *Thames* and *Medway* are both *infra corpus comitatus*, and not within the jurisdiction of the court of admiralty of the *cinque* ports, but all matters arising out of that jurisdiction are properly determinable in the king's courts of record. Notwithstanding which the defendant intending to prejudice him, has drawn him into plea in the court of admiralty of the *cinque* ports for a penalty or forfeiture of 10 *l.* and by his libel suggests, That time out of mind there has been a useful and well regulated society of pilots of *Trinity-house* belonging to *Dover*, *Deal* and the isle of *Thanet*, who have had the sole piloting and loadmanage of ships and vessels up the rivers of *Thames* and *Medway*. That by the rules and orders of this society every person ought to be examined touching his skill in pilotage, before his admission to be a member, or undertaking to pilot any ship or vessel up the said rivers. That by the statute 3 Geo. it is enacted, "That if any person shall undertake to pilot any ship or vessel from *Dover*, *Deal* or the isle of *Thanet* up the said rivers, before he shall be publickly examined, approved and admitted into the said society, as has been usual in the manner that has been mentioned, every such person shall for the first offence forfeit 10 *l.* for the second 20 *l.* and for every other of-

Construction
of statute re-
lating to the
piloting of
ships.
3 Geo. 1.
c. 13.

" fence 40 *l.* to be sued for and recovered with costs of suit by any
 " person whatsoever, in the court of admiralty of the *cinque* ports,
 " if the offender be found within the jurisdiction, or else by action
 " of debt, bill, plaint or information in any of his majesty's courts
 " of record, to be distributed in the manner which the statute di-
 " rects." That the now plaintiff, after making the said statute (*viz.*)
 13 July 1718, did take upon him to pilot the ship *Stratford* from
Dover to *London* up the river of *Thames*, not having been first ex-
 amined and admitted a member of the said society, as has been usual,
 by which he forfeited the sum of 10 *l.* (this being the first offence)
 and because the now plaintiff lived within the jurisdiction of the
 court of admiralty of the *cinque* ports, therefore the defendant caused
 him to be summoned into the said court, in order to proceed against
 him for recovery of the penalty. That notwithstanding he alleged all
 the matters aforesaid in his defence, yet the defendant the further to
 oppress him, libelled against him a second time, thereby suggesting,
 that for time immemorial there have been certain by-laws, customs
 and usages made and practised in the said society, and that it has
 been always usual for every member on his admission to take an oath
 to observe and keep such by-laws, customs and usages before made,
 or then after to be made. That by ancient usage it has been customary,
 on due summons, to remove any members acting contrary to the by-
 laws, customs or usages, or breaking the aforesaid oath, and every
 person so removed has been always deemed and taken to be in the
 same condition, to all intents and purposes, as if he had never
 been admitted a member of the society. That the now plaintiff was
 examined, admitted, sworn, confirmed and inlisted as the statute
 directs. But that afterwards he offended against the by-laws, and
 broke the customs and usages of the said society, and acted con-
 trary to his oath: and thereupon, and upon due summons and proof
 of such offence, and hearing what he had to say for himself, he was,
 according to the ancient usage, removed and expelled from being a
 member of the said society, whereby he became as if he had been
 never admitted. That after such removal he, (not having been
 again examined, approved and admitted into the said society)
 3 August 1718, did take upon him to pilot the ship called *Strat-*
ford from *Dover* to *London* up the river of *Thames*, against the form
 of the statute, *per quod* he forfeited the said 10 *l.* That to this
 second allegation in the court of admiralty of the *cinque* ports the
 now plaintiff demurred in law, and put it in the judgment of the
 court whether he ought to be compelled to make any answer to
 it, *ubi revera et in facto* he says, the court of admiralty had no
 jurisdiction to proceed against him for the penalty, inasmuch as he
 had been once admitted and sworn a member as the statute re-
 quires, and had alleged the same in his defence; notwithstanding
 which the defendant is proceeding against him after a writ of prohibi-
 tion

tion delivered. The defendant as to the contempt pleads Not guilty, and for a consultation demurs.

Yorke pro defendente. Before I enter upon the merits of this cause, I must observe, that as this record stands, the facts of our several allegations in the court of admiralty of the *cinque* ports must be taken to be true; for the now plaintiff has by his demurrer to the second allegation admitted the fact, and offered to put it in the judgment of the court, whether upon that state of the case it be sufficient to compel him to make any answer at all to it. There is likewise a demurrer to the declaration in this court, which if the other was out of the case would have the same effect. Neither is the power of removal to be at all questioned, but it must be taken to be a legal removal.

The main question in this case will arise upon the first clause in the act of Parliament, which after reciting the great usefulness of this society to the publick, and the danger in admitting persons to pilot ships, who are not members of that society, enacts, "That
" if any person or persons shall after 1 *August* 1717, take upon
" him or themselves to conduct or pilot any ship or vessel by or
" from *Dover*, *Deal* or the isle of *Thanet*, to any place or places
" in or upon the rivers of *Thames* and *Medway* before he or they
" shall be first examined, as has been usual, by the master and
" wardens of the said society or fellowship for the time being, touch-
" ing his or their abilities, and shall be approved and admitted into
" the said society at a court of loadmanage by the lord warden of
" the *cinque* ports or his deputy, and the said master and wardens
" for the time being, every such person shall forfeit for the first of-
" fence 10 *l.* (which is the penalty we go for) to be sued for and
" recovered in the court of admiralty of the *cinque* ports, if the of-
" fender be found within the jurisdiction, or else in the courts of
" *Westminster-hall*."

Upon this clause I shall insist, that the now plaintiff having been legally removed from being a member of the society, is (notwithstanding his former admission) such a person as is prohibited by this act from piloting any ships or vessels within the limits that have been mentioned, and consequently that he hath incurred the penalty for the first offence, and being found within the jurisdiction of the court of admiralty of the *cinque* ports, there was sufficient to found the jurisdiction of that court in the suit which we commenced there against him, and therefore a consultation ought to go.

For this purpose I shall shew, that he is both within the words and intention of the statute.

As

As to the words. It will be objected, that the now plaintiff did not pilot this ship *before* he was admitted a member of the society; for there was a previous admission, which is enough to screen him from the penalty, though as to any other benefit he is totally deprived by his expulsion out of the society.

To this I answer. That this is not the proper construction of those words; the plain and natural import of which I take to be, that all persons shall be excluded, who are not at the time of piloting any ship, members of that society. It may not be improper to observe, that by the preamble of this act, the members of the society are described to be persons who have been publicly examined touching their skill and abilities in pilotage before their admission. It takes notice of the many and great advantages of the fellowship as a fellowship, and the good orders and regulations the fellowship is under; and therefore it is considerable, whether the enacting clause, which prohibits all persons before their admission from acting as pilots, shall not be taken to be only a large description of a member of the society, by specifying the particulars that make up and constitute a member. The preamble says, "That all members have been examined, and then approved and admitted." The enacting part prohibits all persons not examined, approved and admitted; that is, all persons who are not members of that society; for this must be understood of an approbation and admission subsisting and in force, such as are valid at the time the party exercises the business of a pilot, and not such as have been made void and done away by a subsequent removal; for how can it be said that any person stands approved by this society as a pilot, who is so far disapproved that he has been turned out.

And this is further explained by the proviso which follows, and excuses persons who undertake the pilotage of ships, when no one of the said society or fellowship shall be ready to conduct and pilot the same. So again, it provides, that all masters of ships shall have liberty to make choice of such pilot of the said society or fellowship, as he shall think fit; and no person shall continue in the said society or fellowship, who shall not comply with the directions of the statute in what is there mentioned. So that every clause being tied up to the being of the society or fellowship, makes it evidently appear, that whoever undertakes to pilot any ship, must be at that time a member of the society, or else that he shall incur the penalties.

This I take to be the plain meaning of the words; but even the intention of the act goes to this case: That a person once admitted,
and

and afterwards removed, was as fully intended to be excluded from the pilotage of ships, as any other person who had never been admitted at all. But that what I shall offer upon this head may the better have its weight, I shall first obviate an objection or two which may be made.

It may be objected, that this is a penal statute, and that penal statutes are not to be taken by intendment; and therefore the plaintiff not being within the words, shall never be exposed to what may be argued to be the intent of the statute.

I must admit this to be the general rule of construction of penal statutes; but then it is under certain limitations and restrictions, and many cases there are which break in upon it. For there is an higher rule of construction than this, and that is, that all statutes which are made *pro bono publico* shall be expounded in such a manner, that they may as far as possible attain their end. That this statute is a law made *pro bono publico*, I believe will not be disputed. The nature of the thing speaks it, and the statute itself takes notice of *the many and great advantages of the said society or fellowship to the publick*. In *Magdalen college* case it is said to be the office of judges, to make *ii Co. 71. b.* such a construction, as will redress the mischief, and advance the remedy, and to suppress all evasions which may be made in order to continue the mischief; that the law will never by any construction advance a private interest to the destruction of the publick; but on the contrary will advance the publick interest as far as possible, though it be to the prejudice of a private one. So likewise is *3 Co. 7. b.* It would be endless to cite cases where penal statutes have been taken by intendment, and therefore I shall only single out two, which are stronger than the case at bar, inasmuch as the penalties are far greater, and one of them extends even to the life of the offender.

By the statute of *27 Ed. 3. c. 1.* it is provided, "That if any person should draw another to the court of *Rome* for a matter which might be determined in the king's courts, or to overthrow the judgments given in such courts, such person should have day by the space of two months, *and if he came not at the day*, he should be put out of the king's protection." Upon this statute a question was made in *30 Ed. 3. 11. b.* whether if the offender should appear and be convicted, he should incur the danger of a *praemunire*; and afterwards in *39 Ed. 3. 7. a.* it was resolved he should; and yet that case is as much out of the letter of the statute as our case: and many judgments have followed that resolution. *44 Ed. 3. 36. a.*

The other case I shall mention is in 2 R. 3. 10. a. which was a question made upon the 8 Hen. 6. c. 12. which enacts, "That if record be razed or stolen away, *by reason whereof any judgment is avoided*, the offender should suffer death as a felon;" the rasure in that case tended to support the proceedings, and yet it was resolved to be felony.

Taking it therefore, that we are proper to construe the words of this statute in this manner; I shall now proceed to shew, that the offence of the plaintiff is such an offence, as was designed to be punished in the manner we are proceeding against it. The statute takes notice of the good rules and orders of the society, which tend so much to the advantage of the publick; and by requiring every member to be first examined, their design was, that no person should have the pilotage of any ship, who was not to be under the awe, and subject to the rules and orders of the society; lest (as the statute takes notice) unqualified persons should undertake the pilotage, whereby the ships and vessels with their cargo and mariners should be lost. Every pilot is likewise required to have his name hung up at the custom-houses, that the merchants and masters of ships may know who to apply to, and what persons they may safely trust. But this man at the time of piloting this ship was not under the controul, or in any degree subject to the rules and orders of the society; his name ought not to be hung up at the custom-house, so as to be known to the merchant, or any others who wanted the assistance of a pilot, because none but the names of members are to be so listed: a person who had never been admitted could but be in the same condition; he is only prohibited from piloting of ships, because he will not be under any regulation, which is so necessary for the service of the publick.

To enforce this a little, I would submit, that persons who have been legally removed from offices or employments, are to be considered in the eye of the law to be in the same case, as if they had never been admitted into such offices or employments. Suppose the by-laws of the city of *London*, instead of prohibiting persons *not being free* from exercising a trade, had run, that no person *before he was admitted a freeman* should set up any trade; I take it within the reason of *Wagoner's* case, that such a person after disfranchisement would be as much subject to the penalties, as persons not being free are upon the present establishment. By the act of uniformity 13 & 14 Car. 2. c. 4. §. 14. it is provided, "That no person shall be capable to be admitted to any benefice or ecclesiastical promotion, or presume to administer the sacrament, *before such time as he shall be ordained priest*, according to the form

“ of the book of common prayer, under the penalty of 100*l.*” Now will any body say, that if a clergyman be legally deprived, yet because he has been once episcopally ordained, that therefore he may officiate wherever he pleases? No, that ordination is to all intents and purposes as if it had never been, and the person liable to the penalty, or else this would prove a very vain provision. By the 11th section of the same statute every schoolmaster is prohibited from teaching any youth, *before licence obtained* from his respective ordinary, under certain penalties: now though the bishop does grant such a licence, yet it will not be pretended, but that it is in his power to repeal it; and supposing he does so, must this man still continue to keep a school? I apprehend he cannot; for if he may, the consequence of that will be, that if the bishop upon any misinformation should once grant such a licence to a person never so unfit, and in whom he was much deceived; that then this person might go on in teaching school, and corrupt our youth, when at the same time there is an express act of Parliament which was made to meet with, and oppose so great a mischief. In 2 *Keb.* 538. where the libel was for teaching school *after* licence repealed, a prohibition was denied. In our case may it not happen, that a man shall get the usual points of examination so well, as to pass a publick examination; and yet when he comes to act as a member of the society, he may be found to be ignorant, or not fit to be intrusted? This may be (and I am afraid has often been) the case, and will it then be pretended to be reasonable, that this person may continue to act as a pilot, and ruin the merchant who commits his ship to his care? I apprehend the reason of the thing tells us, that this man ought to be dismissed from the society; and if he ever afterwards concerns himself in the business, he shall be subject to the same penalties as in case he had never been once admitted. The same reason holds in both cases, *et ubi est eadem ratio, ibi idem jus.*

It will be objected, that admitting this case to be within the intent of the legislators, yet this is a proceeding in a course different from the rule of the common law: so that though a jurisdiction be given them in one matter, yet that may not be extended by equity to similar cases.

This admits of several answers. In the first place I must observe, that if it be admitted (as they who argue in this manner must admit) that this case is in equal mischief, and a similar case; then it is also admitted, that it is just and reasonable it should stand within the same remedy, if it may be: if one offence be of as bad consequence as the other, what reason is there to favour one offender more than the other? which will unavoidably be the case, if the
court

court of Admiralty of the *cinque* ports has no jurisdiction of this cause. Nay it will go so far, as to exclude any remedy at all against the offender; for the jurisdictions given to the King's courts, and the court of Admiralty of the *cinque* ports, are exclusive, and not concurrent jurisdictions, and to be made use of in different cases: the suit is to be commenced in the court of Admiralty of the *cinque* ports, if the offender lives or is found within the jurisdiction, or else by action of debt in the King's courts of record: now the words *or else* exclude the courts of *Westminster-hall* from any jurisdiction in cases where the party is to be found within the inferior jurisdiction: the plaintiff is to resort to one, if the offender lives or is to be found within it; but if he cannot, then, and not till then, he is to seek his remedy in another place.

We are now got so far as to take it for granted, that the plaintiff in this case was designed to be punished for offences committed after his removal: now if what is contended for on the other side should prevail, it may so happen, that such an offender may keep intirely out of the reach of the statute: for suppose he should continually live within the jurisdiction of the court of Admiralty of the *cinque* ports; then upon my former reasoning he could not be proceeded against in any other court: the consequence of which will be, that if this jurisdiction does not extend to similar cases, the offender must go unpunished.

Where inferior courts have been allowed jurisdiction in cases similar to those wherein they have jurisdiction.

But further, I take it to be no new thing for inferior courts, nay courts proceeding by the rules, and in the forms of the civil or ecclesiastical law, where jurisdiction is given them in a particular case, to have a jurisdiction by construction in similar cases within the like mischief. The statute of *Circumspecte agatis* mentions only the bishop of *Norwich*, but yet because what is reason in his case must of necessity be reason in the case of any other of the bishops, therefore it has been construed to extend to all. 2 *Inst.* 487. The same statute after mentioning fornication and adultery has the word *hujusmodi*, and has therefore been expounded to include incest and solicitation of chastity. 2 *Inst.* 488. So the statute of *Articuli cleri*, c. 9. gives remedy where *animalia rectorum* only are taken; and yet in 27 *Aff.* pl. 66. it was held to extend to abbots and priors, who were within the same reason. The statute 2 *E. 6.* c. 13. gives the double value for not dividing, and setting out predial tithes, to be recovered in the ecclesiastical court according to the ecclesiastical laws; and yet that has been extended to the case where he does actually divide them, but then carries them away before the parson has time to take them; and yet the ecclesiastical jurisdiction is given only in the case of not dividing and setting out of tithes. But because it was the intent of the statute, that the setting out should be in

in such a manner, as that the other might have the benefit of them; therefore this device to elude the statute was not allowed to prevail. 2 *Inst.* 649. The decree relating to tithes in *London*, which is confirmed by 37 *H. 8. c. 12.* has the words, "Where no rent is reserved upon a lease of a house by reason of any fine or income paid before hand:" and upon this, 2 *Inst.* 659, 660. it was resolved to extend to cases where no fine or income had been paid before hand; which was not a case within the words of the statute, any more than our case is.

There remains still another objection to be answered, and it is this. That to allow the court of Admiralty to proceed in this case, is to give them a power to judge of disfranchisements, and the validity of corporate amotions.

Court of Admiralty may judge of matters not originally within their jurisdiction, so as they come in by way of incident.

To this I answer, That though they cannot have original cognizance of such matters, yet they may examine into them where they come in only by way of incident. Out of the many cases that might be cited for this purpose I shall select a few, to shew that the rule *accessorium sequitur, non ducit suum principale*, holds equally in inferior and superior jurisdictions. *Bracton lib. 5. f. 401, 406. Regist. 58.* The spiritual court, or court of Admiralty, may judge of a statute, where it comes in incidentally. 2 *Roll. Abr.* 308. *pl. 22.* In *Yelv. 134.* a suit was commenced in the Admiralty for being assistant to the escape of one committed for piracy; and notwithstanding the offence in abetting the escape was committed upon the land, yet in regard it was a dependant upon the offence of piracy, it was resolved to be cognizable there. 1 *Roll. Rep. 21.* In a suit for tithes the defendant pleaded an arbitrement, and a prohibition was prayed for that, and denied. *Latch 228.* The right to the office of Chancellor of the bishop of *Gloucester* came incidentally in question in the high commission court; and because they had jurisdiction of the principal matter, no prohibition went.

If therefore the now plaintiff should be thought not to be within the letter, yet surely he is within the reason of the statute; and being so he is liable to be proceeded against in the court of Admiralty of the *cinque* ports, and therefore a consultation ought to go.

Whitaker Serjeant contra. I shall shew that the plaintiff is qualified within the words of the act, which is sufficient to screen him from the penalty. The demurrer can never be taken as an admission of the constitution and power of removal, for that constitution is no otherwise set out than in the libel; and if any thing stands

admitted by the demurrer, what we say, that the defendant *falso et subdole libellando*, &c. is confessed, for that denies the truth of the libel, as in 27 H. 8. 11. *quare crimen feloniam falso imposuit*, was held to be an absolute denial of the crime.

Then as to the demurrer below, that confesses nothing but what is well pleaded; and in this case they have not pleaded the merits as they ought, for they should have shewn, whether they are a corporation, or only a voluntary society; that they had a power to make by-laws, and that the by-law, against which my client is supposed to have transgressed, is a good and a reasonable by-law: all this should have appeared to the court; and instead of demurring to our declaration, they might have come and shewn all this by plea. *Rast.* 393. 18 E. 4. 29. *Co. Ent.* 122. For how else can they pray a consultation, without establishing the justice of their proceedings, and laying the whole matter before the court.

As to the merits, I apprehend this statute ought to be construed strictly, and that upon three accounts. 1. Because the subject matter of it is an inferior jurisdiction. 2. Because it is introductive of a new law. And 3. Because it is a penal law.

1. As it is an inferior jurisdiction, it is confined to time and place, to persons, actions and things, as they are mentioned in it. In the case of the *Marshalsea*, 10 Co. 75. it was held, that *trespass* would not include *ejectment*, or where a *detainer* is coupled with it; and that is the case of an ancient court, this, of a new one. If the sheriff's torn be held at a different time from what *Magna charta* directs, it is ill. 2 *Inst.* 71.

2. Affirmatives in a new law imply a negative. *Hob.* 298. Nay where it is a remedial law, as in the case of a *quod ei deinceps* in 14 H. 7. 18. and a *cui in vita* in 18 E. 4. 16. 2 *Inst.* 352.

3. This is a penal law, restrictive of that natural right which every man has to have the benefit of his labour and industry, and it gives a remedy which was not at common law before, and is therefore to be taken strictly. *Keilw.* 96. So the custom of gavel-kind, that an infant may alien, was held not to warrant a release. 10 H. 4. 33. And the same limited construction has always been made upon the statute of limitations.

I agree the rule of exposition laid down about statutes made *pro bono publico*, with this restriction, that they are no way derogatory of the common law. In this case the statute provides for the punishment

punishment of persons who lose ships, and that is an argument that they had no notion of a power subsisting in this society, to remove a man for that, or any other offence.

But what I insist upon is, that the removal must be laid out of the case; and the only question now is, whether this man was ever examined, approved and admitted: it appears he has been examined, approved and admitted, and being so he is not a person in any wise prohibited from acting as a pilot. The cases where the spiritual court has judged of matters of freehold, are not like this; for in them they had original jurisdiction of the principal cause. And no case can be shewn where when an act was lawful at common law, and then an act of Parliament has come and altered the nature of it by rendring it unlawful, that such a statute has been extended to similar cases, which I am far from admitting ours to be.

Yorke replied. The argument from the words *falso et subdole* (which are words of course in all suggestions) is nothing to the purpose, for the truth of those facts is not yet determined, the question being whether the court below shall proceed to examine into them. But there was a demurrer below precedent to their suggestion in this court, and that demurrer has put it in the judgment of the inferior court, whether taking our libel to be true, there is disclosed sufficient for the inferior judge to condemn the party.

I agree that by-laws must be set forth, where the point of amotion is in dispute; but not here, where it comes in only by way of incident, in which case the bare alleging, that he was removed, is sufficient. *Bro. Pleading* 87.

Almost all acts of Parliament alter the common law, and yet many of them are construed liberally.

C. J. The question is, whether the plaintiff has incurred the penalty of the statute; for if he has, the jurisdiction of the court of Admiralty of the *cinque* ports to proceed against him for that penalty, is not to be doubted.

As to the words of the statute, I think there is no colour to say the plaintiff is within them; for they extend only to persons *not* examined, approved and admitted. And therefore he is not within the words.

In the next place, to consider the intention of the statute; it should seem as if there was a great difference between the case of one never admitted, and the case of one who has been admitted and afterwards

afterwards removed: a man that undertakes to pilot a ship *before* any admission, acts knowingly against the express words of an act of Parliament; and there is room to suspect his ignorance as to the business he undertakes: but where a person has been once admitted, though he be afterwards removed, yet there is no room to doubt his skill in pilotage, because he has passed a publick examination, and it may be the removal was not for want of skill, but upon some other account, which may afford no ground to distrust his abilities: every man knows whether he has been admitted or not; but every man after he is admitted may not know whether he be legally removed, for that may be a matter of difficulty depending upon the power of the society, and the validity, reasonableness and consideration of their by-laws; for a removal *de facto* can never be sufficient, and it must appear to us, not only to be a removal for acting contrary to by-laws, but also for acting contrary to *good* by-laws. I do not think the case at bar is within the reason of the case expressed *in terminis*.

But even admitting it to be within the intent of the act, yet surely in the case of freehold we ought to be satisfied of the justice of that removal, by their shewing a power to make by-laws, and every other step necessary to make a lawful removal; and for want of this, as well as for want of jurisdiction of the cause, I think no consultation ought to go.

To which *Powys J.* agreed. *Et per Eyre J.* If this had been a return to a *mandamus* to restore, I should have thought it ill; but there is a great difference, where the point of removal is only a collateral matter. The intent of this statute was certainly to secure the pilotage of ships to skilful persons, and the understanding of the pilot was the principal thing they had in view: now can it be said, that this man is *less* a person examined, approved and admitted, by being removed? Does that take away all the knowledge he had before? One cannot infer any incapacity from his being removed, for that might be for a matter foreign to the qualifications of a pilot. If the Parliament had intended any thing of that nature, surely it would have been mentioned.

Fortescue J. The act itself makes a distinction between qualified persons and those who are actually members. The publick is only concerned to see that they who undertake the pilotage of ships are capable of the business; which they certainly are, when they have passed examination. This act is to be considered strictly, and not by equity; for it was never said, that this court shall construe an inferior court into a jurisdiction. The admission is good

to some purposes after a removal, as 1 *Roll. Rep.* 81. in the case of a *pauper* dispaupered. *Per curiam*, Judgment for the plaintiff.

The society applied, and had a clause in 7 *Geo. c.* 21. § 14. for their relief.

Dominus Rex vers. Philips.

THE coroner's inquisition taken *super visum corporis* was quashed, because the year of our Lord in the caption was in common figures, whereas it ought to have been in words at length, or at least in *Roman* numerals. Caption in common figures; ill.

Dominus Rex vers. Johnson.

Mich. 6 Geo.

CONVICTION on 5 *Ann. c.* 14. for keeping a gun not being qualified; and exception was taken by *Fazakerley*, that here was not a reasonable summons, for it was made on 5 *October* to appear the same day, which might be impossible upon account of distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it is to appear *apud paroch' praedict'*, whereas there are two parishes mentioned before, so the man may have gone to one, whilst they were convicting him at the other. *Salk.* 181. Appearance cures defects in summons.

Wearg contra. The defendant appeared at the time and made defence, so that cures all defects in the summons. *Et per curiam*, The answer is right.

Then it was objected, that the statute requires the conviction to be by justices of the county where the offence was committed, and that does not appear in this case. *Et per curiam*, That must appear, or else they have no jurisdiction. *Et per Wearg*, It does, for they distribute part of the penalty to the poor of the parish of *Chelfield in com' Kanc'*, *infra quam paroch' offensum praed' commissum fuit*. And the justices are justices of the county of *Kent*, and stile themselves so. *Adjournatur*.

Mich. 7 Geo. it was quashed; for *per curiam*, their jurisdiction must appear otherwise than out of their own mouth.

Between the Archbishop of Dublin and the Dean of Dublin.

Costs shall be given on quashing writ of error, where there are none to be recovered in the action.

THE defendant in prohibition obtained judgment in *Ireland*, which was affirmed in *B. R.* there, and came over hither by a defective writ of error, which was quashed; and now the question was, whether the defendant in error should have costs, there being none given in the courts below, either on the principal judgment or the affirmance.

And for the plaintiff in error it was said to have been the constant construction on 3 *H. 7. c. 10.* that where there were no costs in the original action, there should be none on the writ of error; and the 4 & 5 *Ann. c. 16.* extends only to cases where the defendant in error would have costs on affirmance. *Cro. Car. 425.* In a *formedon* the judgment was affirmed without costs. So 1 *Lev. 146.* in a *quod ei deforceat*, 1 *Ven. 166.* in the case of an administrator, (and 4 *Mod. 7.* in *replevin* denied to the avowant) and the reason given for the cases before cited is, because there were no costs in the original action; and the words in 3 *H. 7. delay of execution*, are confined to such judgments, where there are costs and damages. 1 *Ven. 88.* in the case of *Harrison and the Archbishop of Dublin*, 10 *Ann.* in prohibition, there was judgment for the defendant in *C. B.* in *Ireland*, that judgment affirmed in *B. R.* there, and also in this court, and in the House of Lords, and no costs ventured to be taken, though able counsel had considered the case.

On the other side it was said, that though there are no costs given below in this case, yet there might have been costs on 8 & 9 *W. 3. c. 11.* (which they shewed was enacted in *Ireland*) and therefore the neglect of taking them in one court ought not to prejudice the party in another. In *Cro. El. 659.* there were costs in a *quod permittat*, and yet the judgment is, only to abate a nuisance. *Harrison's* case passed *sub silentio*; and in *Hyde v. Hallagan*, *Hil. 2 Geo. in B. R.* which was *replevin* in *C. B.* in *Ireland*, judgment for the avowant, and affirmed in *B. R.* and brought over hither; and because the first writ of error from *C. B.* to *B. R.* was defective, this court reversed the affirmance, and gave such a judgment as *B. R.* below ought to have done, *viz.* to quash the writ of error, and after several motions costs were ordered to be taxed.

C. J. The authorities on 3 *H. 7.* being both ways, I think myself at liberty to go into those which seem to me to be grounded on the best reason, and those are such as give costs, for indeed the others

others which are built upon the words *delay of execution* stand upon a very slender foundation. Suppose there were no costs in the original suit, yet is there not a manifest delay to the party? for after a long race, when he reaches a consultation, he is but in the same condition as to the forwardness of his suit in the inferior court, as when he first set out to defend himself against the prohibition. The defendant might have had costs below if he had asked for them, and I think he is intitled to them here. *Et per Fortescue Justice*: Costs and damages will lie in some prohibitions. *Cro. Car.* 559. *Cro. Eliz.* 617, 659. The statute has the word *vexation* as well as *delay of execution*, and will any body say, here is not a manifest vexation to the party, to be travelled thus far from one court to the other, and to have the merits of his cause so long suspended from being determined in the inferior court.

Curia advisare vult; and *Trin.* 6 Geo. Pratt C. J. delivered the opinion of the court, that costs should be paid.

Dominus Rex *vers.* Whitlock.

THE defendant being brought up from *Newgate* by *habeas corpus*, it appeared upon the return, that he was committed for deer-stealing, as the statute 3 & 4 *W. & M. c.* 10. directs, not having sufficient distress; and that this was done by one justice under the statute 5 *Geo.* and two exceptions were taken to the warrant.

Construction
on game act
of 5 Geo.
c. 15.

1. Because it does not appear, the conviction was ever confirmed in this court, or that the rule for confirmation was delivered to the justice, and the words of the statute are, "That *after* the confirmation of any conviction and *delivering the rule* to the justice, it shall and may be lawful, &c." Now this statute gives the justice a jurisdiction after confirmation, which he had not before; and therefore he ought to shew every thing requisite to found his jurisdiction, within the reason of the cases on the statute *Car. 2.* 13 & 14 where orders have been quashed for not appearing to be *upon complaint* of the churchwardens or overseers. So *Hil. 4 Ann. Regina v. Hinam*, a conviction on *Car. 2.* for selling coals by scanty measure was quashed, because it did not appear to be done in the city of *London*. The word *after* makes what comes under it to be in the nature of a condition precedent, and imports something previous to found the jurisdiction.

Car. 2. c. 12.

16 & 17
Car. 2. c. 2.

2. The justice only says, that it has been certified to him by the constable, that there was no sufficient distress, whereas there ought to

to

to have been a warrant to levy, and a return to that, that there was no distress: it may be the constable only told him so.

Et per Pratt C. J. and Fortescue J. (absente Powys J.) the warrant is well enough, for as to the last objection, the word *certified* imports it to be in a legal manner. Then as to the other objection, we take notice of our own records, and by them it appears the conviction is confirmed. The statute does not give the justice a new jurisdiction, but only revives his old one, which was suspended by the *certiorari*, and therefore this widely differs from the case of an order of removal, for there the overseers are in the nature of trustees for the parish, and unless they complain, it is to be supposed there is no grievance, and it is likewise to give an original jurisdiction.

Eyre Justice contra. The old jurisdiction was absolutely taken away by the *certiorari*, and this is a new jurisdiction given upon terms, for the prosecutor has his election to take a *levari* from us, or apply to the justice, and the delivering the rule is what makes his election. We never grant execution on affirmances in the Exchequer chamber, till a *remittitur*. The justice should likewise shew a return, that there was no distress, before he can order the man to be imprisoned; according to Dr. *Bonham's* case and the case *Rex v. Chandler*, Hil. 11 W. 3. in B. R. where it was held, that there must be a record of every fining and imprisonment. There being two Judges to one, the defendant was remanded.

Salk. 378.

Dominus Rex *vers.* Furness.

Order for
tithes.

ORDER for non-payment of small tithes was quashed, *quia* said only *upon complaint* generally, and the 7 & 8 W. 3. c. 6. requires the complaint to be *in writing*.

Poplewell *vers.* Wilson.

Note to pay
for the debt
of another is
within the
statute
3 Ann. c. 9.

ERROR of a judgment *in C. B.* in case upon a promissory note entered into by *A.* to pay so much to *B.* for a debt due from *C.* to the said *B.* And it was objected, that this not being for value received was not within the statute, and *prima facie* the debt of another is no consideration to raise a promise. But the court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received. And the judgment was affirmed.

5

Dominus

Dominus Rex *vers.* Clarke.

THE writ *de excommunicato capiendo* run thus: "*Significavit Excom' cap' nobis* (the bishop) *quod Johannes Pope* (the vicar general) "in a cause between *A.* and *B.* for the contumacy of the said *B.* "*ipsum praefat' B. excommunicandum fore decrevisset auctoritate ipsius episcopi ordinaria excommunicatus fuisset.*" And *Yorke* moved to quash it, because the only nominative case to *excommunicatus fuisset* is *John Pope* the vicar general, so he is said to be excommunicated, and not the defendant. For the sentence is not enough to warrant this writ, but it must be denounced in the church by a person in holy orders, and therefore the *excommunicandum fore decrevisset*, (which I admit goes to the defendant) is not enough.

Et per curiam: It is oddly penned. But the officer informing them, that most of the writs in the office were, and had been so, the court refused to quash it.

Dominus Rex *vers.* Smith.

IN this cause, and also in another against justices of the peace, ^{Practice.} the court refused the common rule for a good jury, because that is often made up of gentlemen who are in the commission.

Between the Parishes of Ivinghoe and Stonebridge.

UPON a special order of sessions the case was stated for the opinion of the court. That in 1702 one *Richard Plower* ^{Apprentice living forty days in a parish to which the master goes as a settled inhabitant gains a settlement.} was bound apprentice to *John Emerton*, who was legally settled in *Ivinghoe*: that he served part of his time there, and then the master went with all his family as a certificate-man to *Stonebridge*, where he purchased an estate of the value of 60 *l.* and after such purchase the apprentice lived with him six months till the apprenticeship expired; and because the statute 12 *Ann. c. 18.* provides, that the apprentice of a certificate-man shall gain no settlement in the parish to which the master goes by certificate, therefore the justices adjudge the settlement at *Ivinghoe*, where the binding and great part of the service was.

Et per curiam: The order must be quashed: for as the apprenticeship expired in 1709, the statute 12 *Ann.* is out of the case, not being made with any retrospect; and then the case is no more, than

Ante 163.

than that an apprentice of a certificate-man lives forty days in *Stonebridge*, which before that statute was enough to gain him a settlement. But if this had been a case since the statute, yet we think the settlement would be in *Stonebridge*; for according to the case of *Burclear and Eastwoodhay*, *Pasch. 5 Geo. in B. R.* when a certificate-man makes a purchase, he immediately ceases to be there in nature of a certificate-man, and becomes a settled inhabitant; so that laying the statute out of the case (as we must do, it being nothing to the purpose) in this view here is a service for six months, as an apprentice, in a parish where the master was legally settled, which is more than sufficient to give a settlement to the apprentice.

Dominus Rex *vers.* Hare et Mann.

Ante 146.
King may try
either issue
first, where
several are
joined.

Pasch. 26
Ed. 3. pl. 2.
Lord Raymond 1288.

SCIRE *facias* out of the petty bag to repeal letters patents, and Mr. Attorney moved on behalf of the crown for a trial at bar the next term, but as to the time was opposed, because it was alleged, that one defendant had pleaded to issue, and as to the other there was a demurrer joined, which went to the whole, so that if the demurrer should be with that defendant, it would make an end of the *scire facias*, let the issue be determined which way it would; and 2 *Cro.* 134. 1 *Inst.* 125. were cited. *Smith v. Bowen*, 8 *Ann.* In appeal the defendant pleaded to the writ, and at the same time (as he might do in appeal *in favorem vite*) he pleaded over to the felony, and there being a demurrer to the plea to the writ, that was ordered to be argued before any trial, because should that be adjudged for the defendant, the other inquiry would be to no purpose. In trespass, if there be two defendants, and one pleads Not guilty, and the other a release, the plea of the release shall be first tried, because if that be true, it is in law a release to both, and makes an end of the matter. In assise, a plea to the writ shall be tried before *Nul tort*, &c. And in the case of the appeal there was a special entry, *quod quoad* the issue of Not guilty *cesset triatio quousque* the plea to the writ was determined.

To this the Attorney General answered, That those cases were between party and party, and bound not the crown: here the *venire facias* is returned and filed, so the effect of their prayer is for me to make a discontinuance. In *C. B.* between *The King and Roberts et al'*, there is now depending a writ of deceit to reverse a fine of lands in ancient demesne; one defendant demurred, and the other pleaded in chief, that it is frank-fee: that issue is tried and found for the king, but the demurrer is not yet determined, and yet that is a case *quasi* at the suit of the party, for the crown is only nominal, and not concerned in interest. *Dy.* 226.

Et per curiam: There is no danger of a discontinuance, for if the *venire* be filed, the proper entry is, That the jury *ponitur in respect*. If it be not filed, you may yet enter a *non misit breve*, and either way will prevent a discontinuance. In the case of the appeal, the bare award, *quod cesset triatio quousque*, &c. was held to be a good continuance of the cause.

As to the principal point, it being the cause of the crown, the court took time to consider; and the last day of the term the Chief Justice delivered their opinion, That the Attorney general was at liberty to bring on either the demurrer or the trial, as he pleased. A trial at bar was ordered for the next term.

Arnold *vers.* Johnson.

At Nisi prius in Middlesex, coram Pratt, post clausum termini.

THE cause was called, and the jury sworn, but no counsel, attorneys, parties or witnesses of either side appeared. Serjeant *Whitaker* being asked his opinion, said the plaintiff ought to be called, for the jury being charged, the cause must be carried on to some determination. But the Chief Justice said, that no body had a right to demand the plaintiff but the defendant, and therefore the defendant not demanding him, he could not order him to be called, but the only way was to discharge the jury. And Mr. *Ketelbey* remembered a case where my lord *Parker* did so upon the like accident.

None but the defendant can demand the plaintiff.

Mr. Ratcliffe's case.

Upon an appeal to the Lords Delegates from the judgment of the commissioners for forfeited estates.

SIR *Francis Ratcliffe* being seised in fee of the premises in question, by lease and release dated 19 & 20 March 1687, settled the same to the use of *Edward* his first son (afterwards earl of *Derwentwater*) for life, remainder to his first and every other son and sons in tail male, remainder to the right heirs of Sir *Francis*. Earl *Edward* the tenant for life died, leaving *James* his eldest son, who entered and was seised of the tail: and 1 May 1712 (being at that time a papist) he conveyed the premises to two persons who were protestants, in order to make them tenants of the freehold, till a common

Tenant in tail may since the 11 & 12 W. 3. suffer a recovery to the use of himself in fee though he is a papist.

1 Geo. 1.
c. 50.

common recovery was suffered, which was accordingly had and suffered of part of the lands in *C. B. Pasch.* 1712, and of the other part, lying in the county palatine of *Durham*, 19 June 1712. Both which recoveries were declared to be to the use of earl *James* in fee. Earl *James* being thus seised of the fee, by lease and release 23 & 24 June 1712, on his marriage with Sir *John Webb's* daughter, conveyed the lands to the use of himself for life, then to the lady for life, remainder to the first and every other son and sons of that marriage in tail male, with several remainders over, and proper limitations to trustees to preserve contingent remainders. The marriage took effect, and the claimant Mr. *Ratcliffe* was eldest son. Earl *James* 19 February 1716, was attainted of high treason, and by the statute 1 Geo. all estates tail, whereof persons attainted were seised, are vested in the crown in fee. The commissioners seize this estate as forfeited by the attainder of earl *James*, upon which Mr. *Ratcliffe* puts in his claim, insisting that earl *James* was only tenant for life, and himself had now the right to his remainder in tail, the estate for life being determined by the execution of earl *James*. 23 December 1718, the claim was disallowed, the commissioners being of opinion, that earl *James* was disabled by the 11 & 12 W. 3. c. 4. to suffer such recoveries, and consequently he remained tenant in tail under the settlement of Sir *Francis*, and so the crown is intitled to the fee. The claimant appeals to the Delegates from the determination of the commissioners.

It was argued several times at the bar on the behalf of the publick and the claimant; but there being a difference of opinion in the court, there will be no occasion to take notice of the arguments of the counsel, since every thing that was materially offered on either side is again repeated in the judgment of the court.

The Delegates were five of the Judges, (*viz.*) Mr. Justice *Powys*, Mr. Justice *Tracy*, Mr. Baron *Mountague*, Mr. Justice *Fortescue* and Mr. Baron *Page*, who all delivered their opinions *seriatim*: and though four of these concurred in opinion to reverse the decree, yet they gave such very different reasons for that opinion, as makes it necessary to state each of their arguments at large, in order to shew the grounds they severally went upon.

The great question in this case is, whether a papist tenant in tail can, since the 11 & 12 W. 3. suffer a recovery to the use of himself in fee, for it was agreed on all hands, that if the recovery had been immediately to the uses declared by the subsequent settlement, it would have been good.

This general question depends upon the construction of the disabling clause in that statute, whereby it is enacted, " That from
 " and after the 10th of *April* 1700. every papist, or person making
 " profession of the popish religion, shall be, and is hereby disabled
 " to purchase, either in his or her own name, or in the name of
 " any other person or persons, to his or her use, or in trust for him
 " or her, any manors, lands, profits out of lands, tenements, rents,
 " terms or hereditaments within the kingdom of *England*, &c.
 " And that all and singular estates, terms, and any other interests
 " or profits whatsoever out of lands, from and after the said 10th
 " day of *April* to be made, suffered, or done, to or for the use or
 " behoof of any such person or persons, or upon any trust or con-
 " fidence, mediately or immediately, to or for the benefit or relief
 " of any such person or persons, shall be utterly void, and of none
 " effect, to all intents, constructions, and purposes whatsoever."

And if the recoveries be within this disabling clause; then *nihil operatur* by the deed and recoveries, and the claimant's father remained tenant in tail as before, and the estate is forfeited to the crown. If not; then he became tenant for life by the new settlement, and the claimant has right to his remainder in tail, as limited to him by that settlement.

Mr. Baron *Page's* argument. This is a case of very great consequence, not only on account of the particular estate now in contest, which is very considerable, but also as it affects the estates of multitudes of papists, and protestants who have purchased under them, and as it is before a court from which there is no appeal.

Mr. Baron
Page's argu-
 ment.

I am of opinion that the claim of the appellant was well founded, and consequently the decree of the commissioners disallowing the claim is erroneous, and ought to be reversed.

The great question is, whether a papist tenant in tail can since the 11 & 12 *W.* 3. suffer a recovery to the use of himself in fee. This is the single point to which it must all at last be reduced.

It has been insisted on for the publick, that by the words of the statute the late Earl was incapacitated to suffer these recoveries; and to make the argument the stronger, it was urged that they were two distinct clauses, which have no relation to each other, and that the last carries the incapacity of a papist much farther than the first.

Whether they are two clauses or one only, I shall not determine, since that is not material to guide us in the construction, where the

only question is, whether the latter part is distinct from, or relative to the former. I think the words of both parts are relative to each other, and the latter only explanatory of the former: they are only different ways of expressing the same thing, in which one perhaps may in itself be of a stronger import than the other, but yet were intended by the legislature to convey the same sense, only in a fuller light.

It was said that unless the latter words are carried farther than the former, they will be intirely useles: but to shew that acts of Parliament are not so nice upon that head, but make use of different expressions as often to clear up their meaning in what went before, as to add new matter, I shall observe, that this very clause now before us is no new one amongst our statutes, but is used in several of them upon occasions that shew they must be merely synonymous with what was said before. Thus 1 *Jac.* 1. c. 4. § 6. makes persons passing or sent beyond seas into popish seminaries, incapable of inheriting, purchasing, taking and enjoying any manors, lands, profits, goods and chattels whatsoever; but not content with those words, it goes on and enacts, That all estates, terms and interests, (in the very words of our statute) shall be utterly void and of no effect. And yet it is evident, these could not carry the incapacity of papists farther than the former words had done; since those exclude him from all benefit whatsoever in any real or personal estate within the realm of *England*.

But what is more full if possible to our purpose is 25 *Car.* 2. c. 2. commonly called the *test act*, by which persons elected into offices, and refusing to take the oaths and receive the sacrament, are made incapable “to take, occupy and enjoy the said offices or employments, or any part of them, or any profit or advantage appertaining to them:” And yet the Parliament, to prevent any equivocation, and to make the matter plain to the *lay gents*, declares further, “That all such office or offices, employment or employments, shall be void;” which no one will say can signify more than what was expressed in the preceding sentence.

1 Ann. st. 1.
c. 32.

I shall mention but one statute more, which is that of 1 *Ann.* concerning the purchase of the forfeited estates in *Ireland*, by which it appears how apprehensive the Parliament was of the danger which might arise to the kingdom by a landed interest subsisting in the papists, and therefore amongst other things it was designed as a prevention of any of those estates from ever returning into popish hands: for this purpose it enacts, “That all papists shall be for ever disabled to purchase any of those lands;” and further, “That all acts whatsoever suffered or done of such lands to or in
“ trust

“trust for any papist shall be void.” This statute seems to have been the very pattern of the act now before us, and though it is impossible to find any use for the latter words, not implied in the former; yet the legislature we see did not think it improper, to express their minds different ways, both with regard to the disability of the person, and the nullity of the acts done for his benefit, though they both in the end amount but to the same thing. Here was certainly no intention in the Parliament, to disable the papists from selling or disposing of their own estates: the restraint was only from purchasing and taking, and it was equal to them, who was the seller or disposer, whether the estate moved from a papist or a protestant: the papist was in all cases alike still disabled from being the taker.

Having now (as I think) cleared this case from any difficulty it might lie under upon account of the different wording of the statute, and shewn that no advantage can be taken against the claimant from the peculiarity of some expressions in the latter part, which were added by the legislature only out of abundant caution, and to prevent mistakes; I shall now proceed to shew, that according to the true intent and design of this statute, the late Earl was not restrained from suffering such recoveries as he did.

And the first thing I would set out with is to observe, that this is a penal law: it takes from persons what by the common law of *England* is their birth-right, and upon that account is to be interpreted strictly, and in such a manner as not to carry the penalty farther than the open and evident intent of the statute, which is a rule of construction that always has, and I trust ever will prevail.

Now the first and plain view of this law was, to prevent the great mischief that had been experienced from the power which the moneyed men amongst the papists had of increasing their landed interest in *England*, and consequently of investing themselves with a larger share of power and influence in the country. To remedy this mischief, the statute provides, That for the future no papist shall make any new acquisition in lands; but there is not any word in it, that looks like a design to take from them their own estates, which they had before: as to those it meddles not with them, but leaves them where it found them; we should then at least endeavour to guard against any interpretation, that tends to the taking away or abridging their present estates, because in so doing we act most agreeably to the sense and meaning of the legislature.

Before the suffering these recoveries, it appears, the late Earl was tenant in tail: every estate-tail has this property inseparably annexed
to

to it, that the possessor of it has a right to suffer a recovery. Should therefore this statute be expounded in such a manner, as to hinder the effect of a common recovery on a papist's estate-tail, it would be taking away one present right which he has as an inherent quality in his own estate, and so far extending the penalty and hardships of this law beyond its principal design, which I have before shewn had regard only to new acquisitions, and being a penal law is to be construed strictly. I must therefore own myself at a loss to find out the reason, why we are to thwart that ancient and constantly allowed rule of construction, by going out of the words, and in my opinion out of the intent, of the statute. That the power of suffering a recovery is incident to an estate-tail, I believe will not be denied: *Mildmay's case*, 1 Co. and 6 Co. 40. are full to that purpose; and there it is said too that all conditions to the contrary are void, and that a tenant in tail has the power over, though he has not the whole fee-simple in himself.

So the case of *Benson v. Hodson*, 2 Lev. 26. 1 Mod. 8. where Lord *Hale*, accounting for a recovery's being a bar to the remainder man, says, that a recovery is a conveyance or method of defeating those limitations, excepted out of the statute *de donis*, which never intended to hinder it, and that the recompence in value is not the reason why the remainder man or reversioner is barred.

But as an answer to all this it is urged, that how true soever it is, that the Earl was seised in tail, and the power of suffering a recovery is the right of every tenant in tail; yet the statute we are now upon has in fact separated this estate and that right: they are to take the statute as they find it, and then it has sufficiently deprived him of the power of suffering a recovery, by disabling him from purchasing.

The ground of this argument is, that the destruction of the estate-tail by the recovery, and the taking an estate to himself in fee, is a purchase within the meaning of the statute.

Now consider the analogy between common sense and this construction: would it not surprize a man who asks who you purchased your estate of, to be told you purchased it of your self: whose was it before? why it was mine, and I purchased it of my self. Would not a person unacquainted with the chicanery of the law think you designed to banter him by such an answer? And I believe the Parliament never thought of such a purchase, where the same person is both donor and donee, grantor and grantee.

I agree it was the intent of the statute in general, to prevent the acquisition of estates by the papists; and therefore if there is a deficiency of any words which might directly comprehend them, we may supply it for that purpose. Thus I take a devise to be within the statute: or if a papist should be suffered to disseise another, and then gain a release from the disseisee; or where he is tenant for life should levy a fine and the five years should pass: in all these cases, or any other of gaining any estate or interest in lands which he could not have purely by his own act, and without the procurement or connivance of the person whose right is lost, I take it he will be disabled by the statute. But I can go no farther, this being in my opinion the utmost extent that either the words or meaning of it can bear: and if we should attempt to carry it further, the mischief aimed at will not be prevented but increased; the popish interest instead of being lessened will be considerably advanced.

For I cannot but think the effect of such a construction will be, to fix a perpetuity to the estates of all the papists in *England*; and instead of removing by degrees all the landed interest out of popish, into protestant hands, it will tend to keep it intirely amongst the *Roman* catholicks: for to make a papist incapable of suffering a recovery, equally hinders the sale to a protestant, or a papist.

Or should the latter part of the statute be interpreted in the utmost latitude the words will allow of, and as a disjoined and separate clause from the former; consider what absurdities we must run into that way. All acts for his benefit or relief are made void; and therefore I cannot but think those words, when stretched as large as some people would have them, will prevent even a sale to a protestant, since no man can be supposed to part with his estate to a stranger, but in view of some benefit to himself. But I hope it will never be pretended, that the Parliament designed any such thing by that expression, when it is evident the statute was calculated to enforce and oblige papists to such a sale.

But if we must interpret the word *purchase* here, not according to common understanding, (which one would imagine acts of Parliament were most calculated for) but in its legal sense, in opposition to taking by descent; yet then I say, the Earl was seised under this recovery much more in the way of a descent than a purchase. For this purpose it is to be observed, that by the first settlement Sir *Francis* became tenant for life, with a reversion in fee to himself after the estate-tail, of which the late Earl was seised before his suffering the recoveries, should be spent. This reversion in fee descended on the late Earl at the same time the estate-tail came to him,

him, and he continued seised of both till the recovery. Now what effect had the recoveries on these estates? why as to the tail, it extinguished that; but could not touch the fee; the consequence of which was, that all the impediment being removed, he was then in possession only of that ancient reversion in fee, which descended to him from his grandfather. 4 *Mod.* 1. the case of *Symmonds v. Cudmore*. Tenant in tail with a reversion in fee makes a lease not warranted by the statute, and dies, the issue before entry levies a fine; and it was held, that the lease was good, for this reason, because the tenant in tail by levying the fine did not carry off the estate-tail so as to avoid the lease, but only extinguished it, and so was in as heir at law to his father of his reversion in fee, and must therefore take that estate together with the father's charge upon it.

Now suppose the late Earl's father had made such lease and died, and the Earl before entry had suffered a recovery, would not this have let in his father's incumbrance? or can there be any difference whether the tail be extinguished by fine or recovery? Whatever act it is, that by removing the intermediate estates, lets in the reversion, it is exactly the same thing: the incumbrances on that reversion, and the incidents to it, must be let in too. And therefore if the Earl had been originally seised *ex parte materna*, he would have been in of the fee on the recovery on the same side.

Common recoveries, it is well known, are only as common assurances, to be interpreted in the same manner, and to convey a title in the same condition, as other conveyances do. Now if one seised in fee enfeoffs J. S. to the use of himself for life, remainder to the use of the feoffee in fee; the feoffee is in only by way of remainder, and not of the reversion as of the residue of the estate which was in him as feoffee. 1 *Inst.* 22. b. *Dyer* 361.

The law looks upon the deed to lead the uses and recovery as both together making one conveyance; and therefore when it happened, that the person to whom a conveyance was made, in order to make a tenant to the *praecipe*, was also lessee for years of the same land; it was adjudged in the case of *Fountain v. Cooke*, 1 *Mod.* 107. that the lease was not extinguished, as it would have been in any other case; because the law considers the recovery with all its appurtenances but as one conveyance, and each of the instruments to bring it about but as part of it.

What I have been saying now to prove that Earl James was in under the recovery rather by descent than by purchase, is supposing it to be true, that all are seised of their estates either by descent or purchase. But indeed I think there is another way of coming to

an estate, and that is by operation of law, as in the cases of tenant by the courtesy, dower, and the lord by escheat: in each of which there is nothing either of purchase or descent, but the law casts the estate on the husband, the widow, and the lord, without any act of their own, or prior seisin of their ancestor. And under this rank perhaps we may place the estate gained by the late Earl under the recovery: he is not seised of any new or really different estate from his first tail, for the tail and fee are in law equal estates, and therefore capable of being exchanged. 1 *Roll. Abr.* 813. But by the means of this recovery the operation of the law has new moulded it, and put it in a different form, from what it was before.

The sum of what I have said under this head is, that he is not in by purchase (taking it in the legal sense) which is prevented from having any effect by the statute: but he is in either by descent or operation of law; both which are confessedly not within the statute.

But then the objection recurs from the latter words of the statute, which say they, are general, and extend to his own acts, that the law doth not regard from whence, but to whom the estate comes; and therefore let the act be done by the papist himself, or by any other; if thereby any estate or benefit accrues to the papist, it is made void.

But first, had the statute intended the papist's own acts, it would have been natural, to have mentioned any acts suffered or done *by* him, whereas the words are only *to* or *for*, which can never include *by*; for *to* is no more than *to himself*, and *for* implies *to another* for himself.

But in the next place, let us consider the consequences of such an extensive construction. The act says, "Any thing done for the benefit or relief of a papist shall be void." Now let those words be but understood in their full extent, to mean all acts done by himself or others in relation to his estate, that are for his benefit; and I may venture to say, they will not leave him even the least mark of ownership in that which is confessedly his own land. Plowing and sowing, making leases (which infants are allowed to do as what is beneficial to them) mortgaging, though to a protestant, or selling in order to raise money to redeem himself from slavery, will all come within the comprehensive meaning now set up of the words *benefit and relief*; for not one of these acts but are in some measure done with a prospect of his benefit or relief.

I mention these, not as things insisted on *in terminis*, but what must follow as a consequence of leaving the main design of the statute, to find out an exposition most to the embarrassment of papists. For I am bold to say, the Parliament never thought of carrying matters to such a length: nor can it be imagined, that a papist tenant for life, with a power of committing waste, is by this act debarred from so doing, and made incapable of digging mines, cutting stone, and the like, and yet this is a stronger case than ours, since it is to the disinheritance of the reversioner.

Agriculture is much favoured and encouraged by the law, whereas we are now inventing a method, how all the lands in the hands of papists must lie for ever uncultivated.

The case most relied on by the counsel for the publick was that of *Roper v. Radcliffe*, which was adjudged upon an appeal to the house of Lords, where an estate was devised to be sold for payment of debts and legacies, and the surplus to go to a papist; and the devise of the surplus was held void upon the present statute, as being an interest and profit out of lands.

But I must own my inability to find how that case has any relation to this before us: I am sure it is very consistent with my interpretation of the word *purchase*: it was an interest out of land, not his own but another's: and this was such a profit, as gave him as full a power over the land, as if it had not been directed to be sold, but devised to him chargeable with debts and legacies; for he might (if a protestant) have come into a court of equity, and compelled the trustees to convey to him on payment of the debts and legacies: this therefore was to all intents a devise of another's land, which I have before admitted to be within the statute.

But say they, consider what you are doing: are not you giving a papist tenant in tail in possession a power to bar a protestant remainder man: and does not this tend to keep the land amongst the papists, instead of drawing it to the protestants? Does not this enable the ancestor to keep the heir steady to his own religion, for fear of being disinherited? And is not this a strengthening of the popish religion?

To this I answer: That it is but a vain terror, and can follow no more this way, than that which is admitted on all hands would have been good. For did not every body agree, that if the recovery, instead of being to the use of Earl *James* in fee, had been immediately to the uses declared by the subsequent settlement, then

every thing would have been right, and as it should be? And where is there any essential difference between the two methods of new moulding the estate? The argument of mischief holds both ways: nay it is universal in one, and but particular in the other; for I am apt to think no body who has the settling of *Roman* catholick estates for the future will ever follow the precedent of this case.

Whether this recovery was suffered really in order to make the settlement on marriage, or whether we can take notice of it as such, I do not think it very material. It is true, it is not expressly averred to have been for that purpose, but yet there is *testimonium rei* that it was, for the *Durham* recovery was 19 June 1712, and the release is dated the 23d, which was as soon as a letter could come to *London* to signify that the recovery was suffered.

Upon the whole I am of opinion, it never was the intention of the legislature, to deprive Earl *James* of any right he had to his own estate. Being tenant in tail, he had a right to suffer a recovery and new mould his estate. He has done so, and raised a good right in Mr. *Ratcliffe*, whose claim I think was well founded, and ought to have been allowed.

Mr. Justice *Fortescue*'s argument. I shall make two questions in this case. 1. Whether this conveyance is a *purchase* within the act. 2. If it should not come under that strict notion of the word *purchase*, whether it is not affected by the latter part of the statute, which speaks of all acts suffered and done to or for the benefit or relief of a papist.

Mr. Justice
Fortescue's
argument.

As to the first; I take it for granted, that he who takes by purchase, is a purchaser; and the consideration is not material, as has been allowed by my brother; and in the case of *Roper v. Radcliffe* it was agreed, that there was no distinction between taking by purchase and being a purchaser. Let us then see what it is to take by purchase. *Litt. §. 12.* says, He takes by purchase, who comes to lands by his own act and agreement, and not by descent. The opposition between purchase and descent, is, that the former is the effect of a man's own act; the latter, the act of law, without, and perhaps against his own act. The meaning of descent is not confined to that particular case where lands come down from the ancestor to the heir; but wherever the freehold is vested in any person by the act and course of law, such person is in, in nature of a descent. 1 *Inst. 18. b.* I must therefore differ from my brother as to his notion of tenant by the courtesy, dower and escheat. Tenant by escheat is said to come in as heir, *in loco haeredis*. Bro.

Escheat 33. where the lord's taking by escheat is put upon the same foot with the heir's taking from his ancestor.

The same is to be said of tenant in dower and by the courtesy: and I never till now heard of that third sort of taking estates, which my brother calls taking by operation of law, as distinguished both from a purchase and a descent. Lord *Coke* indeed does mention a third sort by creation, but that is foreign to our case, and may besides be very properly referred to the head of purchase.

If the act of law concurs with the act of the party, it is a purchase. If the act of law only works the vesting of the estate, it is then a taking by descent. This is the case of the recoveror. He is in, it is true, by operation of law, but his own act is that which first gave motion to it, and consequently he is in by purchase. No one would doubt where the recovery is to the use of a third person, but that he is in by purchase, and yet he too is equally in by operation of law. The late Earl then was within the express words of *Littleton*, for he not only took by operation of law, but in conjunction with his own act and deed executed.

But we are told, this is only the *legal* sense of the word: there is another vulgar sense more intelligible to the understanding of the generality of the world, and the statute is to be intended in that sense.

I must own this is the first time I ever heard, that Judges are to lay aside the legal sense of a law, and run about to find the meaning in which it is received by rusticks and plebeians. The word purchase has a known signification, in which it has constantly been used by lawyers without any variation: and I can never suffer myself to go from that, without an express direction in the body of the statute.

It is said this is not a purchase, why? because he took no new estate, but was in only of his ancient use. What estate had he before the recovery? Only an estate-tail with a distant remainder in fee, after several intermediate remainders in tail to the second, third and other sons: what estate has he now by the recovery? One single fee simple in possession; that is, the several particular estates that were before partly in him and partly in others, are now joined together, and made one in him alone. Now can any one say, that the whole is the same with some of its parts? Or that he has the same estate now he has every thing in him, as he had when others shared it with him?

But then again the objection is altered, and we are told, that the recovery only removes the impediments, and leaves him in, just as he was at first. Be it so; he still gains a new hereditament, which he had not before; and it amounts to the same thing, whether this is effected by taking away the incumbrance, or adding something new. In numbers every one knows the removing a subtraction is making an addition.

But to prove that he was in of his old estate in fee-simple, several cases have been cited. The case of a feoffment to the use of the feoffor for life, remainder to the feoffee in fee, is very little to the purpose. It is grounded on what is said in 1 *Inst.* 23. that whoever is seised of an estate, has both the estate of the land, and also the use or the right to take the profits; and therefore so much of the use as he does not dispose of, continues still in him as his old estate, and so shall go to the part of the mother from whence the estate originally moved. But all this goes on the supposition of a present fee-simple in the feoffor, which in our case is removed to a great distance, after the determination of several other estates.

Another case urged with as little reason, is that of *Symmonds v. Cudmore*; where tenant in tail with an immediate reversion to himself in fee makes an unwarranted lease and dies, the issue before entry levies a fine; and held he shall not now avoid the lease. But this is distinguished from the present case by the same difference as the former: the reversion in fee was immediately in him after his estate-tail, so that he really had the whole estate in the land in himself, only it was cut into two parts. But here the estate-tail in possession and the fee in reversion are disjoined by the intermediate remainders in other persons, who consequently take off part of the whole inheritance. All that this case amounts to is only to prove, that where a man has two estates in him, a lease which he makes is issuing out of both, and therefore when one of them is spent, or any ways removed, it shall be served out of the other.

A case was cited upon the argument, where tenant for life with contingent remainder in tail, remainder to the tenant for life in fee, makes a feoffment to the use of himself in fee; and held that this use in fee was only his old estate. Now there is no doubt but that this must be his old estate, for he was all along seised of the fee-simple, liable only to be opened upon a contingency: all that the feoffment did, was making the contingency impossible ever to happen, and so incapacitates the person who was to be the taker; but this makes no addition to the estate; it only makes that estate absolute

solute in the tenant, which before was liable to be broke in upon and interrupted.

When a fee-simple conditional and an absolute one meet, they are consolidated. *Hob. 223. Salk. 338.*

The case of the Earl of *Lincoln*, *Show. Parl. Cases 154.* is stronger than this. There *Edward* Earl of *Lincoln* seised in fee made his will, and devised the lands in question to the plaintiff; afterwards by lease and release he conveyed them to the use of himself in fee till an intended marriage should take effect, and then to the common marriage uses. The marriage never took effect, and he died without issue or other disposition of the premises. The question in Chancery was, whether this conveyance was a revocation of the will, and held there to be so: and the decree was affirmed in the house of Lords, because the estate in fee gained by the conveyance was not the old estate which the Earl had in him before, it being limited after a different manner, and to be determined on a certain qualification. Now if this variation of the estate was sufficient to destroy his old estate, and put him into a new one; there is much more reason here, the late Earl of *Derwentwater* should be adjudged in of a new estate, when it is agreed here is an alteration of his estate, and it is so great as to vary the very course of descent, which is certainly a mark of a different estate.

It has been said, here is a vendee without a vendor: but this is only a gingle of words. In the case of a devise, there is a *purchase*, as my brother admits, but nothing of a vendor in the case. If the words vendor and vendee cannot be made use of, the law supplies other relative words that are as much to the present purpose; there is devisor and devisee, and in our case I do not see why *recoveror* and *recoveree* may not be used, which may answer the same end, and be applicable according to the different kinds of purchase.

In supposition of law the recoveror is in by purchase: he has gained an estate from the tenant in tail, which he had not before, and the tenant in tail has by intendment of law a recompense in value for it; and the fee, which is recovered, is nothing of that estate which was in the tenant in tail; it is not derived from him, nor can the recoveror make his title under him. This appears evidently from the statute of 7 *H. 8. c. 4.* which was made on purpose to remove an inconvenience that arose from this want of privity between the recoveror and the tenant in tail. By that statute the recoveror has power given him to avow and justify for the rents, services and customs reserved, in the same manner as the tenant in

tail

tail might have done, which supposes he could not have done so before: and that statute had been useless, if the recoverors had been in of the same estate which the tenant in tail had before, for then according to *Doct. & Stud. c. 26. Co. Litt. 104.* he might avow and justify under his title. But the recoverors do not affirm the possession of the tenant in tail, from whom they recover, nor claim by him; but rather disaffirm and destroy his estate; and therefore they cannot allege any continuance of their title by him. So that the recoverors do not come in by the *per* or *cui*, but in the *post*, and consequently are seised of a very different estate from the tenant in tail.

The reason why the remainder-man has no part of the recompense in value upon a recovery is, because that recompense is a fee, upon which no remainder can be limited.

To conclude this head, I think if the old fee cannot take place, so as to make him tenant in tail at the time of his attainder; then the new one must, which I hold to be a purchase, and as such made void by the act.

But as to the second point, whether the estate of the late Earl be not within the latter part of the statute, an interest arising to him by virtue of some act or thing had, done, or suffered for his benefit.

It has been said by my brother *Page*, that this latter clause ought to be tied up to the former, and as intended to take in nothing more than what was before comprehended under the word purchase.

But first here are no words by which this is referred to the foregoing part. In the next place I must observe, that the latter words are more general than the former; and though sometimes subsequent particular words do restrain more general ones that precede, yet I never heard that general ones that come after were restrained by particular ones that preceded. Should we interpret this statute in the manner my brother is contending for, we should render the most common form of speaking and writing vain, where a person that would take in every thing begins with enumerating particulars, and then lest any thing should have escaped him adds the most general words he can think of to supply all possible deficiencies.

The first clause disables the party to purchase, and the second makes all estates, &c. for his benefit void. But if the latter words are to signify purchases only, there could have been no need of them, it being precisely the same thing to disable the party to purchase, and making his purchase void. I shall give you two instances

1 Co. 66.

instances of this: the first is *Rex v. Corporation of Portsmouth*, on the 13 Car. 2. c. 1. § 12. which enacts, That no person shall be elected into any office, that shall not have taken the sacrament; and every person elected shall take the oath, and in default thereof such election shall be void. I objected that the words *in default thereof* were to be understood only of taking the oaths, and not the sacrament; but the court said that could do us no service, because the incapacity of being elected which was created before in those who had not received the sacrament was the same thing as making their election void, and so there was no occasion for those latter words. The other instance is that of *Magdalen College* case, where by statute all leases and grants by that college are made void, and it is there adjudged, that this is the same thing as disabling them to make any grants or leases.

I can easily admit these latter words to be explanatory of the former, but still in such a manner as to carry the disability farther than those did: for the legislature considered, that there were several ways by which papists might come to estates, which would not come under the notion of purchase, though equally within the mischief it intended to remedy; and therefore that they might be sure not to leave any part of the danger unguarded, added those latter words, in order to take in all which the former would not.

In our case indeed the statute does not say, the conveyance to a papist shall be void, but the estate shall be so: this amounts to the same thing, as a lease to a monk for life, remainder over in fee, the whole deed is void, because it can have no effect unless it passes the particular estate, that being necessary to support the remainder. 9 H. 6. 24. b. *Bro. Grants* 133. But if the conveyance can have another effect, the deed shall be good to that purpose, though the particular estate be void: thus a devise to a monk for life, remainder over is not void; though the monk cannot take, it shall be good for the remainder man. But in the present case the recovery itself is void, because it can have no other effect but to pass an estate to a papist, and since the recoverors cannot take for his use, they cannot take at all.

The matter therefore may be reduced to this dilemma. Either the estate-tail is barred, or it is not barred. If it is barred, the fee is in the recoverors, and the same moment in Lord *Derwentwater*. If it is not barred, then the tail continues, and consequently is forfeited by his attainder.

My brother calls this is a relative clause, but I can find but one word of that nature in it, which is *such*, and that has nothing to do

do with purchasers, but is used only to shew that the same persons (papists I mean) are concerned in this as well as the former clause. Indeed there are other words in it, which can have no relation to purchases, such as the words *trust* and *suffered*.

It was said the word *suffered* may be understood of suffered by disseisin: though I should allow of this, yet it does not follow that it does not extend to common recoveries too. In truth the word is applicable to both cases, and many others: as in *Magdalen College* case, where the words of the statute are the same as here, and held that a fine and non-claim is within the word suffered: otherwise it would be to no purpose to prevent alienations, if by suffering a fine to be levied, and five years to pass without claim, the estate might be passed.

Now let us consider whether the interest gained by this recovery suffered by Lord *Derwentwater* himself, is not to the purposes of this act the same as if he had gained it under a recovery suffered by another. I think it is: it is an act by which he procures to himself a larger and more valuable estate than he had before, and he gets it too by taking away from another person, as *Doct. & Stud.* expressly says, he gets what he has from the remainder man. It makes no difference, that all this acquisition is only in the same lands; for a larger and better estate in the same lands is all one in this respect, as a new acquisition of new lands from a stranger. Thus where one devised lands to J. S. for life, and all other my lands to B. it was held, *All. 28.* 1 *Lew. 212.* that the reversion of the lands before devised to J. S. for life passed, because a further interest in the same lands was construed by law as so much new land.

Suppose the remainder man had conveyed his right to the late Earl; can any one doubt whether this had been a new acquisition within the statute? Now where is the difference, whether he gains the same thing by his own act, or the act of another? It is equally in both cases a new hereditament, which he has acquired in the same lands, and that is the same as other lands. 2 *Ven. 286.*

It is said that this statute had no intention to take any thing away from the papists which they had, but only to prevent their having any more lands, and that to suffer a recovery is a power and right inherent in every tenant in tail.

To this I answer, The statute does not (nor does my argument need it should) restrain a papist from suffering a recovery to the use of a protestant. But whether it intended to take away this power, when it is to be used for the benefit of a papist, is the question.

To

To say there is no exprefs intention to prejudice the present right of papists to their estates, is of no weight; because whatever is comprehended under the general incapacity put upon them by the statute, has the same force, as if it was actually named; and I think I have proved, that the present case is so.

It may be said that the Parliament intended not to take away any right from protestants, but yet we see it does, for it prevents their selling to a papist, who may offer more for it than another. So in
1 Geo. 1. c. 50. the statute 1 Geo. against traitors, it was far from the principal design of that statute to injure good subjects and protestants, and yet it has taken away a real interest from them, for it vests all estates-tail of traitors in the crown in fee, whether the remainder or reversion be in a protestant or a papist; it is the consequence of the statute, and it cannot be helped.

But to make this objection the stronger, it is said, that this right of suffering a recovery is so closely connected with the very estate of a tenant in tail, that it cannot be taken away by a condition.

I agree such a condition generally is void, but not where it restrains the alienation to a particular person. This is our very case. The suffering a recovery is left open for the use of protestants, but restrained only as to a particular sort of persons. Whether a recovery by a papist tenant in tail to his own use, is not one suffered for the benefit of a papist, as well as where it is suffered for the use of another papist, is a question not at all affected by this objection: nor does the statute regard whether it be *by* a papist, as my brother imagines, but if it be *to* or *for* a papist it is sufficient.

I would now consider whether the law has not some known species of incapacity, under which the case of the papists upon this statute may be ranked. I think it has. Capacity and incapacity to purchase have been long known in our law, and signified certain precise conditions or circumstances of persons, which lawyers have been at no loss to determine. When this statute therefore incapacitates certain persons to purchase, it must be understood to put them into the same condition in this respect, as those were in whom the law formerly took notice of as incapable of purchasing; such as monks and other religious persons. And the Parliament seems to have had their eye upon these sort of persons, and to lead us to make this comparison, in using the same form of expression to describe the incapacity in this statute which is made use of in the 31 H. 8. c. 6. which enables monks to purchase after deraignment. The papists then are to be considered in the same condition as monks, and as *substantia non recipit majus aut minus*, the incapacity to purchase
must

must be equal in both : and consequently he can no more take an estate by virtue of a common recovery, by whomsoever suffered, than a monk could have taken it.

I cannot imagine how the danger of perpetuities comes to be laid in the way. No body pretends that a recovery to the use of a protestant is prohibited, and as long as papists are at liberty to suffer them, though with that limitation ; they may mortgage, they may sell, or any ways load their estates, and so carry forward the very end and purpose of the statute, which was to remove the land of the nation out of popish hands, by obliging them to sell ; nor is this any real damage to the papist himself, since though he parts with his land, he has an equivalent for it.

It has been said by some of the counsel, that this point was determined in the case of *Thornby v. Fleetwood* : but this objection was never made in that case, and indeed it had been very impertinent ; for first, one of the recoveries in that case was before this statute ; but if both had been since, it could not have made for the plaintiff ; because if they had been void, it would have given him no title, for then *Charles Lord Gerard* had been seised in tail, and the heir in tail is now living : but the true point in that case is, whether *Lord Gerard* took any estate at all, so as to enable him to suffer a recovery.

Another objection has been made, that to destroy this recovery of *Lord Derwentwater*, would be dangerous to many protestant purchasers, who have come in under such titles. But whatever this might have been formerly, it is now removed by the statute 3 *Geo. cap. 18.* which secures protestant purchasers, and looks backward as well as forward, by enacting, “ That no purchases made or hereafter to be made by protestants of papists shall be impeached, on account of any disability the papists were laid under, either by 1 *Jac.* or our statute.

Having thus answered the inconveniencies urged on one side, let us now see whether there are no unanswerable ones of the other. And I think there are : for, 1. To establish this recovery, is to give papists a power of cutting off protestant remainder men, and so far taking away the very landed interest of protestants. 2. They will be able by this means to turn the course of descent, as it shall serve the purpose of removing the estate out of a protestant, into a popish line. 3. They will have a power of making themselves tenants in fee, and upon occasion to distribute freeholds in a county, and influence the state of our legislature by the votes they make at their election. 4. It puts the heir too much in the power of the ancestor,

cestor, who may make use of his liberty, with a view to prevent the conversion of his successor.

Upon the whole I am of opinion, this recovery is within the words of the statute, both as a purchase, and as a greater and better estate which is gained from the remainder man, and turns to the benefit of a papist. For the danger can never be the less, where he gets it for nothing, than where he pays a valuable consideration. If it be within the words, why is it not within the meaning? Is not the meaning to be collected from the words, and the words to be interpreted according to law? It is certainly right, what the Judges said in *Roper's* case, that the words of a statute are to be taken in a legal sense, unless the intent appears to the contrary; and to say the acts of a stranger only are restrained, and not of the papist himself, is to speak without any warrant from the statute, for that makes no such difference, but leaves the persons conveying, all upon the same foot, with no other regard but *to whom* it is conveyed.

I would now mention some cases to justify and clear my opinion. *Roper's* case I apprehend is much stronger than this, that was a devise of lands to trustees to be sold, and after payment of debts and legacies the surplus was to go to a papist; and it was adjudged in the House of Lords, that this devise of the surplus was void, not upon account of the possibility that the papist might have the land itself; for in such cases, if the Chancellor takes care, that the trust be executed, and the land sold, the papist can never have the land, and in fact the land was sold, when that cause came into the House of Lords; so that it was really but a pecuniary demand: but because of the connexion with land, and because it might draw that along with it; it was held to be within the statute. And in the present case here is a greater and more valuable interest in land gained by a papist, which makes it much stronger.

Another case I shall mention, was *Humphrey's* case, which came out of the northern circuit to be argued above. Lessee for ninety-nine years yielding rent surrendered to a papist the reversioner in fee; and held, nothing passed, and the surrender void. It was held so by my Lord Chief Baron *Ward*. Now I would observe, that in that case the reversioner did not take by purchase, but the benefit which accrued to him was by a merger of the term; but because it was an enlargement, and a bettering of his estate, it was held to be within the statute. And where is the difference, whether his estate be enlarged before or behind; by the addition of a particular estate, preceding, intervening or coming after his own? The only thing that is material is the increase, and there is that in our case, as well as in the other.

To conclude, the words of this statute are general, and as large as could be contrived to take in all conveyances, and to obviate such objections as are now set up. The rule of law in construction of these statutes warrants the taking them in a full latitude, for its being a penal law will intitle it to no favour, where religion and the publick are concerned. And so it was resolved in *Foster's case*, and *Magdalen College case*. The statute takes in both considerations: it is made for the preservation of church and state, and therefore is to be carried to its utmost extent.

For these reasons I am of opinion, that the claim was well disallowed, and consequently the decree of the commissioners ought to be affirmed.

Mr. Baron *Mountague's* argument. This is a case of great importance, as it is on the construction of a statute, which though made twenty years ago, has never yet been fully considered: and it is of difficulty too, because two learned Judges have already differed, and I believe I shall differ from both in many points.

Mr. Baron
Mountague's
argument.

It appears that at the time of suffering this recovery there was a marriage settlement on foot, and it is evident to me, that the recovery was had for that end. Lord *Derwentwater* is tenant in tail of an ancient family estate with remainders over. When a treaty of marriage was on foot between him and Sir *John Webb's* daughter, in order to make a jointure and provision for the marriage, he agrees according to the common method of conveyances, to make a tenant to the *praecipe* in order to suffer a recovery, and declares the uses to himself for life, then to his wife for life, remainder to the claimant as first son in tail. Such recovery was had, and the marriage took effect: he was attainted of high treason: and the question is, whether the estate is forfeited, so as to exclude the first son of the marriage.

N. B. He mistakes the case, for the use of the recovery was only to himself in fee; and the uses he mentions were afterwards declared by an original deed of settlement, and the Baron's whole argument depends upon a mistake of the case.

For my own part I think the matter will come to this dilemma, either Lord *Derwentwater* took by virtue of this settlement, or he did not. If he did take, then it was for life only, and he could forfeit nothing but an estate for life, and being dead, the claimant's estate-tail must take place. If he did not take by virtue of this settlement, what hindered him? The statute, say they, of 11 & 12 W. 3. which makes him incapable of purchasing. And if so, then nothing was in him to forfeit.

The only way of avoiding this dilemma is, that which brother *Fortescue* has taken, by saying that not only the uses to Lord *Derwentwater*

wentwater himself are void, but the whole conveyance is void also: *nihil operatur* by all this: here has been a bargain and sale to make a tenant to the *praecipe*, a recovery suffered, uses declared, and all this comes to nothing. This I take it is the foundation of the judgment given by the commissioners. But surely he that considers the words of the statute, which says only, "That all estates and interests for a papist shall be void," but mentions nothing of the conveyance itself, cannot be of that mind. But it is said it amounts to the same thing in the present case; for if the uses are made void, and he is disabled to take, and so the conveyance carries nothing, it is really making the conveyance itself void: and the case of a monk is put to support this, where a lease to him for life, remainder over, is void as to the whole conveyance on account of his incapacity. I agree it is so where the conveyance is to a person incapable of taking; and so if in our case the conveyance had been to a papist, this might have been true; but here are several persons capable of taking concerned in this conveyance: there are several remainders over that may be good, since they are to persons who do not yet appear to be papists, and the present claimant is young and may become a protestant: there are also trustees to preserve the remainders from the ceasing or forfeiture of the particular estate. So that I cannot see that Lord *Derwentwater*'s incapacity will make the whole conveyance void, when it may, and was intended to subsist for other purposes than that of passing an estate to a papist.

Let us consider this whole conveyance particularly. Here is first a bargain and sale to *Vaux* for a valuable consideration, (*viz.* 5*s.*) he is a protestant, therefore without doubt every thing is right thus far, to vest the estate in him and make him tenant to the *praecipe*. Supposing now the subsequent recovery intirely void; the estate then remains in him. This appears evidently from *Poulter's* case, 1 *Co.* that though superstitious uses are void, yet if a penny had been given as a consideration, it would be sufficient to pass the estate absolutely to the feoffees to their own use; otherwise it would revert to the feoffor. In our case the consideration is greater, for 5*s.* was actually paid. And this shews that the uses to a papist may be null, and yet the conveyance not void.

If then the bargainee is seised of this estate, it must be out of Lord *Derwentwater*; and it cannot be otherwise, unless the *praecipe* be ill brought against *Vaux*.

The next thing is the recovery, and this is gained by one *Ridley*. He too is a protestant capable of taking, and consequently the recovery vests the fee-simple in him. Should now the uses of this be void, the consequence would be that Lord *Derwentwater* would

would gain nothing by it, and it would make him incapable of losing any thing also, since all the estate he had is passed away to others already.

Brother *Page* says, that it is the right of tenant in tail to suffer a recovery: I agree it is so, with this limitation, that no act of Parliament declares his suffering it a forfeiture, as in the case of "a tenant for life." But how comes it to be his right? It is the right in common justice of all mankind to bring a *praecipe* when they have a better right than the tenant in tail; and when the recovery passes against him, it is because in intendment of law the demandant has the better right. This is the ground of the judgment, and this is the true reason of its being a bar to the remainder man, as well as to the tail. The demandant recovers a clear fee-simple (on which no remainder can depend) without any regard to, or being at all affected by the particular limitations of the estate of which the tenant was seised. All the dependants on the estate-tail can have nothing to say to him, who comes in under the recovery paramount to the tail.

My brother who argued first, mentioned the case of *Benson v. Hodson* in 1 *Mod.* but did not make use of the point resolved by the court, but only the saying of Lord *Hale* in relation to recoveries. I never found my opinion on the *dictums* of reporters, in which they are very apt to mistake the words and sense of the Judges from whom they take them; and so it seems to be in that case. Lord *Hale* is there reported to have said, that the recompense in value is not the reason why common recoveries are bars to the remainder-men, but because those are conveyances excepted out of the statute *de donis*. But it is the text of *Litt.* §. 688. that if tenant in tail suffered a feigned recovery, the issue might falsify it in a *formedon*. This shews that at common law such recoveries as we now make use of to bar estates were not known; and therefore it would have been ridiculous in the statute *de donis* to have excepted recoveries, since common recoveries were not used, and recoveries on good title could not be imagined to be included. If issue was taken on the disseisin alleged in the writ of entry, and found for the demandant, and so the recovery on a point tried; this at common law would bar the issue, there lying an attain against the jury; though where it was by default, it would not. But afterwards another middle way was found out, and favoured by the Judges, to prevent the inconvenience of perpetuities; and that was where the tenant in tail appeared and vouched over, and the vouchee made default, and so there was a judgment for a recompense to one, and for the land demanded, to the other. This judgment, though by

default, and without issue tried, was held a bar, on account of the recompense in value.

My brother *Page's* notion of Lord *Derwentwater's* coming in under this recovery by operation of law, as something distinct from either a purchase or descent, is very new and uncommon. One of his instances of an estate passing in that manner is the case of a tenant by escheat: but I think my brother *Fortescue's* opinion is right as to that, for he certainly comes in by descent, *in loco hæredis*.

But why is not this taking by the recovery a purchase? I wonder how that can be made a question amongst lawyers: is not this the very point in *Shelley's* case, where old *Edward Shelley* is adjudged to be a purchaser of a new estate, by suffering a recovery?

But then the question is, whether this be a purchase within the meaning of the statute of King *William*? As to that, I think I need not enter into it, because the case turns upon the dilemma I mentioned before.

My opinion is, that the conveyance and recovery are good, and if my Lord *Derwentwater* gained any estate, it was but for life. If he gained none, he had nothing to forfeit. So that taking it either way (he being now dead) the commissioners had no right to seize this estate, and consequently their decree ought to be reversed.

Mr J. Tracy's
argument.

Mr. Justice *Tracy's* argument. I am of the same opinion with my brother who argued last, that the decree of the commissioners ought to be reversed.

The question is, whether the recovery be void, or not; which depends on that part of the statute, by which every papist is disabled to purchase in his own or another's name, and all estates, terms and interests had, done and suffered for his benefit or relief, are made void. I take this to be one entire clause, and the latter part put in only to explain and enforce the former; and there was great reason for it. The first part only disables papists to purchase lands, but not interests or profits out of lands; and therefore the latter was necessary to disable him to purchase those as well as the lands themselves. But if the latter part is to be construed as a distinct independant clause, then the first part would be rendered wholly insignificant; since the latter has all that the first has, and much more. So in 1 Jac. 1. c. 4. from whence this clause is taken: Persons passing or sent into popish seminaries beyond sea are made incapable, as to themselves

themselves only, and not as to their heirs, of inheriting, purchasing or taking any manors, lands, &c. " And all estates, terms and interests made, suffered or done to or for their benefit and relief " shall be void." Now this must be taken all together but as one entire clause, for otherwise the latter part will be a repeal of that part of the foregoing, which makes them incapable only as to themselves, and not as to their heirs.

But now as to the meaning of the clause before us. It sounds strange to me, that the act of the tenant in tail himself on his own estate should make him a purchaser of it. A purchase I take to be *acquisitio rei alterius*, either by free-gift of the former owner, or for a valuable consideration. 1 *Inst.* 18. b. But what is a common recovery? It is nothing but a common conveyance, and the only method which the law gives the tenant in tail of enjoying his estate in its full latitude; and it is as much the proper conveyance of a tenant in tail, as a feoffment is of a tenant in fee-simple, and therefore very unlikely to be restrained by the general words of a statute. I think it could not be the intent, since there are no express words to that purpose; and I am the more inclined to such an opinion in this case, because it appears to me, that such a restraint, instead of promoting any end of the statute, serves to defeat its principal design.

The strength of all that has been said to bring the recovery within the disabling clause lies in this, that the fee gained is a new and greater estate than Lord *Derwentwater* had before, and so makes him a purchaser.

But this is more in appearance, than in the nature of the thing. I think the recovery cannot be said to give any new estate, because it operates only by way of bar; and an estate or interest barred is extinct and gone, and cannot properly be said to be transferred. The suffering a recovery is no more than making use of that very power which the law had given him over his own estate, and when he has by this gained the fee, he has in reality got no greater interest in it than he had before; the course of descent only is altered, so that it shall now go to one sort of heir, whereas during the continuance of the tail it would have gone to another: but as to himself, he had the whole estate absolutely at his own disposal before, and he has no more than that now. How then can this be said to be a purchase, especially in so penal a law?

But if this is a new estate, from whom does it come? Not from the remainder-man or reversioner, for their estate is gone and extinguished. And therefore the case of a grant from the reversioner

ner of his reversion is very different, and so of a surrender of a tenant for life to the reversioner; in both which cases there is an estate really taken from another man by his own act and consent. So in Lord *Lincoln's* case cited by my brother *Fortescue*: he had devised the estate, and then made a lease and release to the use of himself and his heirs; and it was held to be a revocation of the will. But this would be the same, if a man after making his will makes a feoffment to the use of himself and his heirs; this is a revocation, because it shews an alteration of his mind, but yet in that case it is confessed he would be in of the same estate.

The recoveror is merely a nominal person, which the law requires, in order to fulfil the solemnity of a recovery; but has nothing at all to do with the estate; and if the tenant makes no declaration of uses, the law will do it for him, for the estate passes only from the tenant in tail, and not at all from the recoveror; and so it was held in the case of *Abbot v. Burton*, *Salk.* 591.

The case of a feoffment and refoffment is very different; because the estate in that case was once really out of the feoffor, and when it comes back again by the express act of the feoffee, it comes as a perfectly new estate: but in our case, in consideration of law the estate was never out of the tenant in tail. The bargain and sale to make a tenant to the *praecipe* are but one conveyance, and to whomsoever the use is limited, he takes immediately from the tenant in tail.

I cannot think the lord by escheat comes in by descent, as has been said; there is no foundation for it in *Co. Litt.* 18. b. He only says, that such an estate differs from one by purchase, because he comes in by operation of law, as *he* does that comes in by descent. But this does not prove that the lord by escheat comes in by descent.

But now if the law itself, as I have said, would make a declaration of uses of the recovery to the tenant in tail, in fee, which can be nothing but the old estate which he had before this conveyance; it is the same thing if there be an express limitation in the same manner as the uses would have resulted. This was adjudged upon two ejectments in the case of *Godbolt v. Freestone*, 3 *Lev.* 406. A man seized *ex parte materna* makes a feoffment to the use of himself for life, remainder to his wife for life, remainder to the issue of his body, remainder to his own right heirs. He and his wife died without issue, and the question was between the heir of the part of the father, and the heir of the part of the mother; and held that this was the old use remaining in him; and there was no difference
whether

whether the use be by express limitation, or implied by the law without limitation, and therefore should go *ex parte materna*.

Some stress has been laid on the word *suffered* in the statute, as particularly adapted to the case of a recovery; and I should think this of some weight, could that word be applied to no other recovery but this. But there is room enough for the use of that word, without taking in the present case: it may be applied to the case of a fine; to a recovery of a stranger's estate by a papist, fairly or by collusion; and in general to all recoveries whereby a papist is to gain some really new estate.

But if this recovery should be strictly within the letter of the statute, yet I do not think it is within the meaning of it. The intent of the statute was to take away the capacity papists had of acquiring new estates, not the power of disposing of their old ones: and on this ground I conceive there may be several cases put, where even new estates may be gained, and yet not be within the meaning of the statute. As if a papist had before the statute made a settlement to himself for life, with remainders over, and a power of revocation, and after the statute he had executed that power; he has now gained a new estate, and yet as this is only making use of the power he had over his own estate, I think it will not be within the statute. Suppose a papist should in an ejectment recover an estate, will any body say this is within the statute? Or suppose before the statute he had a particular estate with a condition of accruer of the fee on performance of a certain act, shall he not perform this and gain the fee to himself, notwithstanding the statute? Surely he shall, for the statute had no retrospect to take away any right vested in a papist.

Another reason why I think it not within the statute is, because it will not answer any end of the statute to construe it so. The end of it was to lessen the papists property in land; but how can this be answered by forcing them to continue their ancient estates? By virtue of the tenancy in tail they have an equal share of power and influence in the country as if they had the fee. They have the same power in elections: they may give freeholds, and not only make votes, but even give capacities to stand as candidates for an election; for he may make them an estate for life, and I am apt to think a tenant in fee would go no farther.

But not barely to say this construction will not answer the end of the statute, I am bold to say this construction will in a great measure defeat it, by making the estates of papists much more secure than they were before: by allowing these recoveries all papists in

remainder and reversion are cut off: the estate becomes affets in the hands of the heir: it is liable to charges in favour of younger children; and all sorts of incumbrances, which are excluded by the continuance of the tail, are let in; and it is subject to more forfeitures, particularly for felony, which the tail is not liable to: and thus by loading the estate a papist will be at last obliged to sell, and then the end of the statute is answered.

No argument can be drawn from the unreasonableness of putting the remainder man and reversioner into the power of the tenant in tail, for we see the statute of forfeitures has taken no care of them at all: and why we should be more solicitous for them than the legislature was, I can see no reason.

The case of *Roper v. Radcliffe* I think not at all like this, the true reason of that judgment was, that if he had taken by the devise, it was looked on in nature of a purchase of the land itself. My brother *Fortescue* says, the estate was sold before the hearing in the House of Lords, but I do not know that.

This statute is now twenty years old, and many purchases made under such recoveries as these, which were never questioned till now: and though there is a statute lately made for the security of such purchasers, yet I cannot but pay a very great regard to the opinion of so many learned men, who have gone on in this method ever since the statute.

As to the point of the reversion in fee, expectant upon the intermediate remainders, being now let in by this recovery; it was mentioned by the counsel, but I shall not give my opinion upon it, because I think it not necessary; and besides it is a very important point, only the case of *Symmonds v. Cudmore* goes a good way to prove it.

Upon the whole, I think this recovery to the use of Lord *Derwentwater* in fee was good, and therefore the decree of the commissioners ought to be reversed.

Mr. Justice
Powys's argu-
ment.

Mr. Justice *Powys's* argument. Before I deliver my opinion, I would just take notice of what is agreed in this cause; which is, 1. That a papist may suffer a recovery, in order to make a title to a protestant purchaser. And 2. That if the recovery had been declared immediately to the use of Lord *Derwentwater* for life, &c. *prout* the settlement, it would have been well enough, which I take to be a great concession.

I am of opinion to allow the claim. There have some things been mentioned in this case, that seem not so necessary to be insisted on, because that which I take to be the main point is not affected by them. As whether the estate is so fixed in the tenant to the *praecipe*, as to continue in him if the recovery should be void: but I take it, the whole conveyance is of a piece, and must stand or fall together: And if the recovery is made void, I think the whole conveyance must be so too.

Another matter not so necessary is, *quid operatur* by all this? Whether under this recovery Lord *Derwentwater* is in of his old, or a new estate? I shall take no notice of this, but go directly to that which will determine the whole case. And I am clearly of opinion, that the recovery suffered in this manner is not within the statute.

Originally an estate-tail was fee-simple conditional; and the tenant had the same power of aliening it after issue had, that a tenant in fee-simple now has. It was this *poteestas alienandi*, that was struck at by the statute *de donis*, which had no intention to alter the nature of the estate, but left it to continue as it was before. *Salk.* 619.

But then they began to feel the inconvenience of perpetuities, and upon that they looked out for a method to trip up the statute *de donis*, and make these intailed lands capable of being purchased. For this purpose common recoveries were set up and allowed, and these are said, *Salk* 338. to have taken off the protection of the statute *de donis*, which is as pretty an expression as I have met with. And the use of these recoveries for that purpose is grown so common, that they are now looked upon merely as a method of conveyance, by which the power of alienation that tenants in tail have over their estates is to be exercised; and the estate conveyed is not supposed to arise out of the estate of the recoveror, but of the tenant in tail only. Hence it is, that recoveries have all along been construed most favourably, not under the notion of a judgment in a suit at law, but as a common assurance, and *Cromwel's* 2 Co. 74. case directs the Judges not to look into them with eagle's eyes. They have been allowed even of advowsons, though no *praecipe* lies of them. 5 Co. 40. *Ray.* 7. The preciseness of form, which is required in other writs, is not necessary in them. 2 *Roll. Rep.* 67. Remainders and reversions expectant on estates-tail are so much in the power of the tenant in tail, that they are of little or no consideration in law.

It

It is said that the recovery enlarges the estate; but I deny it, for the estate-tail is still a fee-simple conditional as before the statute of *Westm. 2.* and that in the eye of the law is equal to an absolute fee-simple, and therefore capable of being exchanged for it. It is not an enlargement, but only a removing of an obstacle.

Suppose before the statute *Will. 3.* a papist had been in possession of an estate defeasible upon tender of a ring, and after the statute that right of tender had been released; will any body say this is a purchase of a new estate, and as such made void by the act? I believe no body would offer to assert it.

As the estate is not enlarged by the recovery, so what is gained under it is served out of the old estate. It is not a new estate which is gained, but only an excrescence; as a new sprout can never be called a new tree. Hence all grants and incumbrances made by tenant in tail are still charged on the estate in fee. It takes them as related to the former estate; whereas if this was a real recovery of an estate paramount to the tail, all those charges would be gone.

I think this right to suffer a recovery is such an inseparable interest, as cannot be taken away without express words. 1 *Inst.* 223. *b.* And I am of opinion with my brother who argued last, that to allow of these recoveries is a weakening of the popish interest, for the reasons which he has given.

There is another thing proper to take notice of, which arises out of the statute we sit upon, which vests the estates-tail of traitors in the crown in fee. This shews the sense of the legislature as to the tenant in tail's estate; that it is in effect the same as a fee, and that he is the perfect master of the whole fee; otherwise they would be guilty of an injustice too great to suppose them capable of, in stripping the remainder man (who has committed no crime) of his estate, merely because the intermediate tenant had committed treason.

According to the opinion of the four Judges who argued for the claimant, the decree of the commissioners was reversed, and such judgment given as should have been given below, *viz.* that the claim be allowed.

Easter Term

6 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Philip Yorke, *Esq; Solicitor General.*

Nicholson *vers.* Simpson.

Intr. Pas. 5 Geo. rot. 220.

DEBT upon a bond; the defendant prays *oyer* of the condition, which recites, that whereas the defendant had been convicted for unlawfully killing one deer on a place called *Whinnyrigg Ground* in the parish of *Clifton* in the county of *Westmorland*, and within the chase of the Earl of *Thanet*, on or about the third day of *August* then last past, and had brought a *certiorari* to remove such conviction into the court of *B. R.* If therefore on affirmance thereof he pays such costs as the statute directs, then the bond to be void: *Quibus lectis* he pleads, that the conviction recited in the condition for killing a *red deer* at the time and place mentioned was never affirmed in *B. R.* and prays judgment of the action.

Whatever is materially alleged and not traversed is admitted.

The plaintiff replies, and sets out a conviction of the defendant for killing a *red deer* between the last day of July and 6th of August, in a chase of the Earl of *Thanet* called *Oglebird* alias *Whinfield* in the

parish of *Clifton* in the county of *Westmorland*, which was removed into *B. R.* and affirmed: and then avers, that the defendant never was convicted for killing any other deer in the said chase, or any part thereof; that the deer and the killing mentioned in the conviction, are the same with those in the condition; that the place called *Whinnyrigg Ground*, mentioned in the condition, lies in the chase called *Oglebird* alias *Whinfield* in the conviction mentioned; that the chase in the conviction and condition are the same; and the parties the same both in one and the other.

The defendant in his rejoinder craves oyer of the conviction, which is set forth *in haec verba*, and agrees with the recital of it in the replication; and then taking by protestation, that the killing in the condition and the killing in the conviction are not one and the same, for plea he says (as before) that the conviction in the condition mentioned for killing a red deer in *Whinnyrigg Ground* on or about the 3d of *August* was never affirmed in *B. R.* And to this rejoinder the plaintiff demurs.

Filmer pro quer' argued, that the rejoinder was ill; for it appears sufficiently to the court, that the conviction upon account of which this bond was given has been affirmed. The conviction answers the description of the condition in every part, but as to the time and place, which are not material variances. 1 *Saund.* 116. Or if they are, yet it is cured by the averments, which have been always allowed in cases of this nature. 4 *Co.* 71. 8 *Co.* 115. 11 *E.* 4. 2. *Cro. Car.* 501. *Lutw.* 1414, 1419. 3 *Lev.* 179. Nor does any prejudice arise from this to the other side; because if it be not true, he may traverse the identity: here he had an opportunity so to do; he has not done it, and so has by his silence admitted the fact to be as we have alleged; for whatever is materially alleged on one side, and not traversed by the other, is always taken to be admitted. 2 *Ven.* 170. *Salk.* 91. So that, be this variance material or not material, either way it is against him upon this record.

Agar contra. The averment as to the identity can have no force, because it is contrary to what appears upon the face of the record; the killing in the condition being in a particular part of the chase, and the other laid to be in the chase at large, so the same evidence will not serve both: Besides, here is no averment of the identity of the conviction, but of the crime only, whereas a man may be doubly convicted of the same offence.

But if the averment should be taken to have cured the variances, yet the plaintiff should have gone on and assigned a breach in the replication; for as it now stands, the bond is not forfeited, unless
the

the plaintiff was put to charges, and those charges unpaid, and nothing of that appears. 1 Saund. 102. Yel. 78. Salk. 138. Show. 140.

Per curiam, It is certain that the identity must appear to us, before we can give judgment against the defendant. But though there are variances, yet the averments (which are consistent with the record) have sufficiently solved them. It would have been improper to have averred the indentity of the conviction, and so have sent that to a jury, especially when it is consequentially determined by the other averments, as it would have been if the defendant had taken issue upon them. Then as to the objection for want of a breach in the replication; certainly there was no occasion for that, because the defendant has not made his case upon the performance of the condition, but upon a collateral point by way of excuse, which admits a non-performance; and it has been often resolved, that where the defendant pleads matter of excuse, which admits a non-performance; it is enough for the plaintiff in his replication to meet the plea, and falsify the excuse, except in one instance (which stands upon a particular reason) and that is the case of an award, where it has been held indeed that upon *nul agard fait* pleaded, the plaintiff must not only reply and set out an award, but he must go farther and assign a breach, that it may appear to be in a good part of the award; for since it has been held that an award may be good for part and void for the rest, it is necessary to shew a breach of a good part, or otherwise the plaintiff has no cause of action, for the bare finding there is an award will not intitle the plaintiff to recover. Besides this, payment of the costs goes in defeasance of the bond, and should have been shewn by the defendant, being for his benefit. Or if the replication had been ill, yet the plea is so too, for it is not *ad idem*, the condition being for killing a *deer*, and the plea a *red deer*, and then the declaration must stand, and the plaintiff have judgment.

Yel. 78.

Salk. 138.

Show. 148.

1 Sid 180,

186, 290.

1 Saund. 102,

317.

Hob. 198,

199, 233.

2 Cro. 472.

Where the defendant pleads matter of excuse, the plaintiff need not assign a breach except in the case of an award.

Dominus Rex *vers.* Nicholson & al'.

BY a private act of Parliament for enlarging and regulating the port of *Whitehaven* several persons are appointed trustees, and a power is given to them of electing others upon vacancies by death or otherwise. The defendants take upon them to act as trustees without such an election as the statute requires: and upon a motion for an information in nature of a *quo warranto* against them, it was objected by the counsel for the defendants, that the court never grants these informations, but in cases where there is an usurpation upon some franchise of the crown, whereas in this case the King alone

Informations are granted for usurping a power which was no prior franchise of the crown.

alone could not grant such powers as are exercised by the trustees; the consequence of which is, that this authority was no prior franchise of the crown.

To this it was answered and resolved by the court, that the rule was laid down too general, for that informations have been constantly granted, where any new jurisdiction or a publick trust is exercised without authority. That this case came even within the defendant's own rule, for all havens belong originally to the crown. The publick trade and revenue are much concerned in the regulations of ports; and there being a particular method of election required, we will always keep people up to that method; and rather than suffer them to vary from it, we have construed corporations to be absolutely dissolved. An information was granted.

Between the Parishes of Albrighton *and* Skipton.

Order.

UPON appeal from an order of removal made by two justices (*quorum unus*) the sessions, reciting that they had perused the charter of *Albrighton*, and it not appearing *thereby* that the two justices were either of them of the *quorum*, therefore they quashed the order of removal.

Per curiam, The order of sessions must be quashed; not for want of any power in the sessions to look into the jurisdiction of the two justices, for that they certainly have; but because that want of jurisdiction is not sufficiently alleged; since they might have a jurisdiction, though it did not appear upon the charter of *Albrighton*. The sessions should have said in general, that it appeared to them, that the two justices were neither of them of the *quorum*, and that would have been good cause to quash the order of the two justices.

Davila *vers.* Herring.

Costs.

UPON trial of the issue a case was made and afterwards argued in court, but the fact not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed, to go to a new trial; where the plaintiff was nonsuited. And now the question was about the costs, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings. And upon motion for the court's direction to the master it was ordered, that he should tax the defendant his costs upon the whole, as well with relation to the first trial as the last.

Winter *vers.* Lightbound.

THE plaintiff obtained judgment of *Michaelmas* term generally, but was stopped from taking out execution by an injunction out of Chancery; which being afterwards dissolved, he takes out execution *teste* the last day of the subsequent *Michaelmas* term; and whether he could do it in this case without a *scire facias* was the question.

If the plaintiff be hung up a year by injunction, he must have a *scire facias*.

And the whole court held the execution irregular, as taken out after the year; for the judgment being general has relation to the first day of the term, and so there is all *Michaelmas* term over and above a year. And they said the statute of *Westm.* 2. which is *infra annum*, must be computed by calendar months, and not by terms; for it was insisted, that taking one term inclusive and the other exclusive, there was but four terms.

How the year is to be computed.

It being thus determined, that the plaintiff was without the year; the next question was, *Quid operatur* by the injunction? Which was compared to a writ of error, and there it has been often resolved, that though the party be hung up never so many years by a writ of error, yet there may be execution sued out immediately upon affirmance without a *scire facias*. But the court said, there was a great difference between the case of a writ of error and an injunction; the former being a judicial proceeding appearing to them upon record, whereas an injunction is not a matter of record so as that the court can take notice of it.

Salk. 322.
Show. 402.

Anderson *vers.* Coxeter.

PER curiam: The 9th & 10th *W.* 3. c. 15. which limits the time of complaining against awards to the last day of next term, extends not to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation: and nothing is a ground within that statute for us to set aside an award, but manifest corruption in the arbitrators. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded.

What is a good ground to set aside awards, and to what awards the statute extends.

Dominus Rex *vers.* Leonard.

Curia de Banco nostro, when the King speaks, signifies the King's Bench.

TO an indictment for high treason he had pleaded Not guilty; but having afterwards procured the King's pardon, he was brought to the bar, and by consent of Mr. Attorney he waived his former plea, and confessed the indictment: and being then asked, what he had to say against the court's proceeding to sentence, he kneeled and pleaded the King's pardon under the great seal, which was delivered into court, and read, and appeared to be upon condition to transport himself, and to give such security so to do, *qual' curia de Banco nostro dirigeret*. And the doubt was, whether the King's Bench could take the security? and upon consideration it was held, they could; for this description was not confined to C. B. as if it had been *curia nostra de Banco*; but here *nostro* coming after *Banco*, it runs in *English* the court of our Bench; and this being spoke in the person of the King, it amounts to calling it the King's Bench. And Eyre Justice, cited *Articuli super chartas*, c. 5. which says, *Les Justices de son Banke*, and my Lord Coke in 2 *Inst.* 554. says, they mean the King's Bench.

Woodward *vers.* Robinson.

If the plea does not cover the whole, and the parties are at issue; yet if it be a record of the same term, the plaintiff may still take judgment.

CASE upon several promises, and *inter alia* upon a note for 65 *l.* an *indebitatus assumpsit* for 36 *l.* 9 *s.* 5 *d.* and a *quantum meruit* for carpenter's work and materials, wherein he avers he deserved 36 *l.* 9 *s.* 5 *d.* for the work, and the like sum for the materials.

The defendant as to the count upon the note pleads, that he gave a bond in satisfaction of the said 60 *l.* and the plaintiff received it as such. And as to the said several sums of 36 *l.* 9 *s.* 5 *d.* and 36 *l.* 9 *s.* 5 *d.* that he gave a note for so much in satisfaction, and upon issues tendred the defendant demurs.

Upon standing in the paper, no body appeared for the defendant; but it was observed by the court, that there was a discontinuance. And at another day *Strange* for the defendant argued, that there were two discontinuances. 1. As to the note for 65 *l.* where the defendant in his plea has artfully dropped 5 *l.* and pleads only a satisfaction for 60 *l.* And 2. in the plea of a note in satisfaction, which covers no more than two several sums of 36 *l.* 9 *s.* 5 *d.* whereas there are three such sums in the declaration. *Pasch.* 4 Geo.

Nichols

Nichols v. Backhouse, in an *indebitatus assumpsit*, the defendant *quoad* so much parcel of the damages, pleads one plea; *et quoad* so much, *residuum*, pleads another; and on error, when it stood to be affirmed, *Eyre* Justice observed, that between the two pleas the defendant had dropped a penny, and the court held it a discontinuance. So is *Yelv* 5. *Carter* 51.

To this it was answered, and resolved by the court, that as to the first part of the objection, there was no discontinuance, it being pleaded *quoad* the whole promise; and though it be in law only an answer to part and by that means a naughty plea, yet it will not make a discontinuance; so *vice versa*, if it be pleaded as to part, it will be a discontinuance, though in law it is an answer to the whole. As to the other point, they all held it a discontinuance; but then *Eyre* Justice observed, that it being a record of this term, the plaintiff might yet take judgment by *nihil dicit* for so much as is uncovered by the plea; and cited two instances where it was so done, *Vincent v. Preston*, *Mich.* 11 *W.* 3. *rot.* 183. and the case of *Marcas v. Johnson*, *Hill.* 3 *Ann.* *Salk.* 180. What manner of pleading makes a discontinuance. *Salk.* 179. 2 *Roll. Abr.* 104. N. 1. Lord Raym. 716.

Whereupon the cause was adjourned, to give the plaintiff an opportunity to set it right, which he did. And at another day, *Strange* for the defendant argued, that though the discontinuance was now out of the case, yet the plaintiff ought not to have judgment, because by his replication to the first part of the plea he has offered an immaterial issue: the declaration being upon a note for 65 *l.* the issue offered is, whether any bond was given in satisfaction of a note for 60 *l.* And he cited *Hob.* 113. *Kent v. Hall*, where in debt upon a bond for 10 *l.* 10 *s.* the defendant pleads payment of the 10 *l.* *secundum formam conditionis*, upon which they were at issue, and found for the plaintiff: but a repleader awarded, for that the issue was not *ad idem*. And he likened it to the case of *Merril v. Jocelyn*, where in debt upon a bond the defendant pleaded payment before the day, and found for the plaintiff; but reversed upon error, because the issue did not leave room enough for the jury to find an absolute breach of the condition. And so it was held in two cases in *C. B.* *Pasch.* 5 *Ann.* *Steele v. Manby*, *Idem v. Hill*.

Per curiam: The replication is certainly naught, but then so is the plea, and the first fault being there, the declaration must stand, and the plaintiff have judgment.

Moody *vers.* Thurston.

Practice.

ACCCESS was granted to the books of the commissioners for stating and determining the debts of the army, at the prayer of the defendant, being an officer's widow.

Bellamy *vers.* Barker.Words *nient*
actionable.

AFTER verdict *pro quer'* for these words, "Your father was a horse-stealing rogue, and you are a great rogue," the judgment was arrested, because not actionable.

Archer *vers.* Frowde.A general
admission of
prochein amy
is sufficient.

ERROR of a judgment *in C. B.* in trespass and assault by one infant against another; verdict *pro quer'*: and assigned for error, that whereas the plaintiff had appeared to prosecute this suit by one *Isaac Knight* her next friend, as one specially assigned by the court, yet the said *Isaac Knight* was never so assigned, nor does any such admission appear upon record. *In nullo est erratum* pleaded.

Strange pro quer' in errore argued, that the defendant having come in *gratis*, and pleaded *in nullo est erratum*, had thereby taken away the necessity of the plaintiff's procuring the return of a *certiorari* to verify the error, for now the fact is admitted, and put in judgment of the court, whether upon that state of the case there be error in point of law or not.

Though there is a verdict in this case for the plaintiff, yet the matter assigned for error is such as at common law would have vitiated the judgment. In the case of a person of full age want of warrant of attorney was always held to be error, till the 32 H. 8. and then surely the want of an admission of a *prochein amy* is much more so, because according to 1 Roll. Abr. 287. A. 2. and many other books, where it is said, that the reason why an infant cannot authorize an attorney to appear for him is, because he is not supposed to be capable of chusing a proper person, and therefore (says the book) he shall have a guardian appointed, against whom he may have an easy remedy in case of misbehaviour: but before he can sue by *prochein amy* there must be the appointment of the court, and that must likewise appear upon record; whereas in this case it

is admitted there never was any appointment to prosecute this suit. The statute *Westm. 2. c. 15.* which appoints an infant to sue by *prochein amy* runs in *omni casu quo minores infra aetatem implacitare possunt, concessum est quod proquiuiores amici admittantur ad sequendum pro eis*, which in 2 *Inst.* 261. is taken notice of to be thus rendered by *Fleta*, *Sequatur unus de proquiuioribus amicis et admittatur*, and this admission, says *Coke*, must be by order of court.

As this is an error at common law, it lies upon the other side to shew, whether it be within any of the statutes of jeofails. There is no such thing mentioned in any of them, and there was a case, which is a tacit admission, that it is not within them, and that was *Read v. Waldron* in *B. R. Hill. 6 W. 3. rot. 249.* Trespass by *prochein amy*, Not guilty pleaded, and a verdict for the plaintiff: the same error assigned as here, and upon a *certiorari* returned, that there was no admission, in *nullo est erratum* was pleaded. But after this a *certiorari* was awarded *ad informandum conscientiam curiae* (which need not have been if the verdict had helped it) and then an admission was returned, and the judgment affirmed. Lill. Ent. 288.

But it will be objected, that in this case the very fact of our assignment of errors appears upon view of the whole record to be false; for that *Isaac Knight* is returned at the head of the record to have been admitted to prosecute and defend all suits in *C. B.* on behalf of the infant.

To this I answer; that the admission returned is not such an one as we have assigned the want of for error, which is an admission to prosecute in this particular cause; and I have an affidavit that according to the course of *C. B.* there must be a separate admission in every cause to prosecute or defend in *placito praedicto*, and such an admission it is that is wanting in this case; so that to say here is a general admission, is begging the question, because a general admission is not sufficient.

Indeed in this court it is taken, that an admission of a guardian to appear in one cause will serve for others, but that depends upon the particular practice of this court, that one in custody at the suit of *A.* is bound to answer all other suits against him of the same term, without a distinct process to bring him in. But still in suits by an infant (which must be by several processes) there must be separate admissions, for the reason fails which supports the contrary practice in suits against an infant. And agreeable to this is the entry *Rast. 396. a. Concessum est quod W. B. sequatur pro J. C. qui infra aetatem est, versus H. E. de placito terrae*; and the admission re-

turned upon the second *certiorari* in *Read v. Waldron* was particular, to prosecute that suit.

At common law, before the statute which enabled men to make attornies, all parties appeared *secundum exigentiam brevis* in proper person, unless where they purchased the King's writ of *dedimus*, and that always recited the pendency of such a particular cause: and in the case of an infant, *Register* 172. a. 93. b. 27. b. there are writs to the Justices of C. B. signifying that such a person is deputed to sue for the infant, and so requiring them to admit him; and these recite a suit depending between A. plaintiff and B. defendant *de placito transgressionis*, or as the case is.

Wearg contra. In nullo est erratum confesses no errors which are improperly alleged, but as to such it serves for a demurrer, and that we say is this case, for the error assigned is contrary to the record, which runs, *et unde eadem Susanna quae infra aetat' 21 annorum exist per Isaacum Knight proximum amicum suum per curiam domini Regis de Banco nunc hic specialiter admissum existentem queritur*, &c. *Cro. Eliz.* 655. Held that you cannot assign for error, that there was no such attorney as the defendant has appeared by, because it is contrary to the record, which calls him his attorney.

As to the practice, I am told that when this general admission was entered, it was objected to by my client, and the officer of C. B. informed him it must be so.

But if it should be error at common law, yet it will be cured by 18 Eliz. c. 14. 18 *Eliz.* which helps want of warrant of attorney; and this is a case within the same reason.

Strange replied. There are no general words in 18 *Eliz.* and to say it shall extend to cases of the like nature will be making that statute entirely useless, for the 32 *H. 8. c. 30.* had before helped want of a warrant of the party against whom the issue was tried, but went no farther; and then the making the subsequent statute to extend to the warrant of the other party, shews the judgment of the Legislature, that similar cases were not within the former provision; and it is stronger too, because in the 32 *Hen. 8.* there are general words.

The recital in the declaration can never be set up against the admission returned at the head of the record, which is, *Concessum est* that *Knight* be admitted *tam ad prosequendum quam ad defendendum* all suits by and against the infant. In *Read v. Waldron* there was the same recital (*pout per roll*, which was brought into court and inspected.)

Curia. The practice of this court warrants a general admission, and there is no inconvenience in it: it amounts to the same thing, whether the admission be general or particular, and no reason can be given why it should not be one way as well as the other. The judgment of *C. B.* was affirmed.

Brocas vers. the Mayor and Aldermen of the city of London.

THE plaintiff moved that he might have a copy of the poll, and that Sir *John Ward*, who as mayor presided at the election, might produce the original at the trial; and Serjeant *Cheskyre* *pro quer'* cited two cases and produced the rules, where a copy of the poll was ordered to be given, and the original to be produced. The court never orders a poll to be produced without a particular reason.
12 *Ann.* Sir *Peter Delme's* case, and *Trin. 4 Geo. Parminter's* case.

Strange contra. As to a copy they have had it already: and as to producing the original, we take that to be an extraordinary attempt, because no use can be made of the original which they will not have the same advantage of from a copy. *Mich. 5 Geo. Rex v. Smith*, Ante 126. (on consideration) the court declared, that where things are evidence of themselves, as corporation books, &c. they never will make a rule to produce the original, unless it appears to be necessary to be inspected upon account of rasure or a new entry; and so it was held likewise *Mich. 4 Geo. the company of Gunsmiths vers. Turville*. In *Smith's* case indeed there was a rule on a justice of peace to produce an examination, but that was upon account of the necessity of proving the hand of the party, before it could be read against him; and in that case the court was so tender, that they would not oblige the justice himself to attend, but pronounced the rule, not *quod producat*, but *produci faciat*, the examination at the trial.

As to *Delme's* case, I observe upon the rule, that it was made without any affidavit; from whence we may apprehend, there was somewhat of a consent to it: but as to *Parminter's* case, I remember there was a juggle about the poll, and some suspicion of alterations, so great, that the mayor attended here a whole year upon an attachment for not producing it; and that was the particular ground upon which that rule was made.

Per Pratt C. J. We never order the original to be produced, where the copy is evidence, without such a particular foundation as
has

has been mentioned. It was denied in Sir *Gilbert Heathcote's* case, and I remember there was a consent in the case of *Delme*.

Eyre J. In the case of *Marlborough* the original was ordered to be produced, but then it was upon an affidavit of a rasure. *Et per Fortescue J.* This poll is either a publick thing, like corporation books; or else it is only in the nature of the officer's own private memorandum. If the first, then a copy is as much as you can ask, without some particular foundation. If it be only of a private nature, then you cannot have so much as a copy. The plaintiff took nothing by his motion.

Anonymous.

The court will not turn over a prisoner till officer paid for bringing him up.

A Prisoner was brought up from *Oxford* gaol by *habeas corpus*, in order to be turned over to the King's Bench; but the court refused to do it, because the sheriff was not paid the charges of bringing him up, and so he was remanded.

Dominus Rex *vers.* Mackintosh.

Person committed for treason done in Scotland, not within the *habeas corpus* act.

Mich. 7 W. 3. B. R. Rex v. Leeson & al. Per curiam, If one applies to us to enter his prayer, we will not bail

him at the end of the term, if the treason be in another county than where we sit. But we will send him thither by *habeas corpus*, where he must make a new prayer.

HE was committed for treason done in *Scotland*, and the first week in this term applied to enter his prayer upon the *habeas corpus* act. *Sed per curiam*, We cannot do it, for that prayer is only in order to be tried, and we cannot try a treason committed in *Scotland*. It was then offered by the counsel for the defendant, whether within the equity of that statute (since there could be no application elsewhere) the court would not enter his prayer, and bail him at the end of the term, in case he is not before that time sent to *Scotland*. *Sed non praevaluit. Hil. sequente*, there being nothing done, he moved to be bailed, but denied. And *Pas. sequente* the attorney general consented to his discharge.

Leighton *vers.* Leighton.

Voidable act, evidence.

UPON a trial at bar the defendant made title under an old in-tail, and amongst other things offered an inquisition *post mortem* in 25 *H. 8.* whereby it was found, that the deceased tenant was seised in fee, and upon traverse of this it went down to be tried, and found to be only a seisin in tail, upon which judgment was

was given, and an *amoveas manus* issued. This was objected to by the counsel for the plaintiff, because it was taken and tried in *com Salop*, whereas the lands lay in *Wales*, and this being before the 27 H. 8. c. 26. which united *Wales* to *England*, was *coram non judice*, and a mistrial. But the court ordered it to be read, saying it was not void but voidable, and cited *Murrey* and *Wise*, where on a trial at bar depositions irregularly taken were allowed to be read.

The same objection taken on a trial in the Exchequer, and over-ruled.

Dominus Rex vers. George.

ERROR of an indictment at sessions for a misdemeanor, whereof the defendant was convicted, and it was reversed for three exceptions: 1. Because it was *ideo veniat inde jurata*, when it should have been *praeceptum est vicecomiti*. 1 Sid. 364. *Rex v. Knott*. 2. It was *venerunt* the jury in the preterperfect, instead of *veniunt* in the present tense. *Trin. 2 Geo. Rex v. Earl*. 3. *Quia tam*, &c. was left out in the award of the *venire*, which is an essential part. *Reg. Jud. 76. a*.

Exceptions in error of an indictment.

Trin. 7 Geo. Rex v. Pearson & al. Jud. revers. for this fault in indictment for disturbing a congregation.

Withers vers. Warner.

ERROR *e C. B.* in case upon several promises, demurrer to the declaration, and *judicium pro querente*, and want of an original and warrants of attorney assigned.

The court will take notice that *London* is a city.

Strange pro defendente in errore. As to the warrants of attorney, the plaintiff has not verified that error by the return of a *certiorari*, so we have entered a *non misit breve*, and laid that matter out of the case.

As to the original, I apprehend the plaintiff has not verified his error in the manner he has alleged it, which can only be done by one of these two ways, either by the other party's coming in and confessing it, or by his own procuring the return of a *certiorari*, that there is no original in the cause: here is no confession of the error, and therefore the question will be upon the return of the *certiorari*, whether by that return the plaintiff in error has so far established the truth of his assignment of errors, as to be intitled to have this judgment reversed. And I take it he has not done so in this case, for the action being laid in *London*, therefore the *certiorari* commands the *custos brevium* of *C. B. Quod scrutatis brevibus originalibus de praedieta curia de Banco, de London, de termino Pas. anno 5* of the King, he should certify to the court, what he found about it. To this the *custos brevium* returns, *Quod scrutatis brevibus*

brevibus originalibus ipsius Domini Regis civitatis suae London, non habetur aliquod breve originale civitatis London de praedicto termino in his custody: all which may be true, and yet there may be an original to warrant the judgment, directed (as all other writs are) *vicecomitibus London* only: and therefore the command being to search for a writ directed *vic. London*, and the return being that there is none directed *vic. civitatis London*; that amounts to no more than if he said, I am it is true ordered to search the files of writs in *London*, but instead of that I have perused all the writs of the city of *London*, and find none between these parties; or in other words, I cannot find an original directed, as never any original in the world was ever made.

As they who procure this return are labouring to reverse a judgment, I apprehend the court will hold a stricter hand over them, than they would do if it were in order to an affirmance: and the court is always very exact in making the plaintiff in error verify his errors in the manner he has alleged them. There was the case of *Lord Peterborough v. Atkins* in the Exchequer Chamber in *Trin. 5 Geo.* where we had assigned several matters of error, and in order to verify them we prayed a *certiorari* to the *custos brevium* of the court of Exchequer; and it was objected of the other side, that this was no prayer of a *certiorari*, there being no such officer in the court of Exchequer; but the writ ought to have been prayed to the Barons: I was counsel in that case, and I did offer it to the court, whether they would not take the words *custodi brevium* to mean any person who had the custody of the writs, and not confine it to any particular person as an officer called a *custos brevium*; but the court said they would construe nothing in our favour, and so the judgment was affirmed.

As to the variance between *London* and *civit. London*, there is *Bro. Repleader 6. Dett* against *A. B. nuper de Bristol*: the defendant pleads, that the day of the writ purchased he was *commorant* at *Dale*, *absque hoc* that he ever lived *apud praedictam villam Bristol*; and found for the defendant: but a repleader awarded, for that the writ was *Bristol* and not *villa Bristol*, and yet there was the word *praedict.* to tie it up to what went before, which is wanting in our case.

And as to what may be said, that every body knows that *London* and *the city of London* are synonymous expressions to denote the same place: To this I answer, 1. That taking this return as a matter of fact, then though *London* and *the city of London* are one and the same; yet in point of fact a writ directed *vic. London* is not a writ directed *vic. civit. London*. 2. In the next place, to take it as a matter of law, it is to be considered how this *certiorari* and re-

turn are possible to be reconciled; and I can see but one way to do it, *viz.* by the court's taking notice judicially, that *London* is a city, which I apprehend they never will do.

It is true, and therefore I must admit, that the court will take notice of counties, for they are to be considered as part of the common law, delivered down to us from time immemorial: but then in relation to cities, the applying the rule, *quod ubi est eadem ratio, ibi idem jus*, is (as I apprehend) begging the question, for I must insist that the same reason does not extend to both cases.

Every city must be so, either by charter, or prescription; and therefore to say the court will take notice of cities, is to say the court will take notice of charters and prescriptions, which is a notion I believe was never advanced, otherwise than as now by way of consequence.

If they take notice of charters, there will be the same reason to take notice of the nature of every incorporation; and when that is done, I much question whether the same reason will not introduce all the by-laws and customs of particular places into the judicial knowledge of the court, which would be the absurdest attempt imaginable. In the case of *Argyle v. Hunt in B. R. Trin. 5 Geo.* after sentence the defendant came for a prohibition, alleging that it appeared upon the face of the libel, that the word *whore* was spoken in *London*: but the custom of *London* did not appear, and they could not go out of the libel after sentence for a ground for a prohibition; and therefore the court did declare, that they could not judicially take notice of it, and that though they had such a private knowledge of it as not to put the party to produce an affidavit in every case; yet they could not proceed in any case without proof of the custom, if the plaintiff below thought fit to insist upon it. And to this I may add the constant form of pleading, which is setting out at first, *quod civitas London est antiqua civitas*, not to mention the innumerable authorities which require all inferior jurisdictions (of which *London* is one) to set out *quo jure* their courts are held, in all cases where the point immediately concerns themselves. Ante 187.

For any thing appearing upon this record *London* may as well be a ville as a city; and though I can cite no cases where the court has said they will not take notice of cities, yet I rely upon this as a strong argument it was never so much as thought they would, till the other side produce authorities to shew they will. In the case of the *King v. Clerk*, 5 *Mod.* 162. *Salk.* 349. *Holt C. J.* put the case of a nonconformist living in a borough that sent members to Parliament contrary to 17 *Car.* 2. c. 2. and he was discharged,

discharged, because not averred in the return, that *London* sent members to Parliament, for the court could not take notice of it.

But further: when this return comes to be narrowly considered, it will appear to be in a manner insensible. The words are, *non habetur aliquid breve originale civitat. London*, which in *English* will run, That there is no original *of* or *belonging to* the city of *London*; whereas the writ in this cause can belong to no body but the plaintiff. And how then can it be said to be a verifying the error, when he is commanded to send up the writ which the plaintiff purchased to found the jurisdiction of *C. B.* for him to say he has not the writ which belongs to the city of *London*.

Since therefore the judgment *may not* be erroneous, the court will take it to be right; and we had no occasion to allege diminution, and put ourselves to the charge of fetching up the right original, when there is nothing appearing upon this record to obstruct our having the judgment affirmed.

Wearg contra. This being a matter of form must be governed by the practice, and it is the constant form which the *custos brevium* uses. It is agreed, that the court will take notice of counties; and then *London* being a county, you will take notice of that too. If there had been a county called *London*, and a city called *London*; as *Oxford* and *Gloucester*, and others; there might be some colour of objection upon account of the uncertainty. But in this record it appears, *London* is a city, for the writ of inquiry is executed *apud Guildhall civit. London*. A writ may be said to be of, or belonging to *London*, without a necessary implication that *London* is the owner of it.

C. J. We ought to support this judgment if we can: the error assigned is so much against the honour of the court of *C. B.* by supposing them to usurp a jurisdiction, and proceed without authority, that I must have the clearest proof in the world, before I can declare they have done so: and I will intend, there is an original, till it appears impossible there should be one. To maintain this return, and set aside the judgment, we are to be led out of the record, and take notice that *London* is a city: and if the court would not do it in the case in *Bro.* to support a verdict, I am sure there is no reason we should do it, where the consequence is to overthrow the proceedings: Though *London* is a county, yet it may not be a city, as is the case of *Poole*, and *Haverfordwest*.

Eyre J. (absente Powys) The case in *Bro.* is not law. 2 *Cro.* 263. *Hob.* 6. I am afraid this form has been too often used, to
I be

be now set aside. *Cro. El.* 489. *Norwich* and the county of *Norwich* were taken to be the same. *Ibid.* 866.

Fortescue J. We take notice of publick acts of Parliament, and in many of them *London* is called a city: we take notice what is couched under an *&c.* in the award of a *venire*, and when an avowant speaks of the *locus in quo*, *&c.* we know what he means.

Adjournatur. And this term *Powys J.* being also in court, the Chief Justice and the rest were of opinion, that they must take notice that *London* was a city, it being mentioned to be so in several acts of Parliament; and therefore held the error to be verified, and the judgment of *C. B.* was reversed.

Hackett *vers.* Marshal.

ON error from *Ireland*, it was objected, that the defendant was an infant, and therefore there ought not to have been a *capiatur*. To which it was answered, and resolved by the court, that there being a verdict in the case, and the statute 16 & 17 *Car. 2. c. 8.* here, being enacted in *Ireland* by 17 & 18 *Car. 2. c. 12.* the fault was cured; although the adding a *capiatur* where neither that or a *misericordia* lies, is not expressly mentioned, but only the putting one for another, or omitting either of them, it being a matter of like nature not against the right of the matter of the suit, or whereby the issue or trial are altered. And the judgment was affirmed. *Strange pro defendente in errore.*

Adding a *capiatur* where none lies, is aided after a verdict.

Trinity Term

6 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Dominus Rex vers. Inhabitantes de Telfcombe.

Contributory order must be to raise a certain sum.

PER curiam, The order for the contributory parish to make a rate at 6 *d.* in the pound is ill for incertainty: it should have been, to raise such a certain sum. Quashed.

Barber vers. Boulton.

Where the charter appoints the election of a mayor to be out of the body at large, it may be restrained by a by-law to a select number. 4 Co. 77. b. Salk. 190.

UPON *non fuit electus* returned to a *mandamus* for swearing the plaintiff into the office of mayor of the borough of *Macclesfield*, wherein the jury found a long special verdict, the case was no more than this. By the charter the mayor is to be chosen by the capital burgeses out of the capital burgeses, who are twenty-four. The usage for fifty years has been, that the common burgeses have put five of the capital burgeses in nomination, out of which five the capital burgeses have chosen one to be mayor: and this the jury find was according to a by-law not now extant in writing, and that

that there are no footsteps before these fifty years of any election in any other manner.

At the charter day the common burgesſes meet and put eight capital burgesſes in nomination, whereof the plaintiff was one, and he had the majority of the capital burgesſes for electing him to be mayor.

It being agreed that this election was not according to the uſage, the counſel for the plaintiff inſiſted, that it was an unreaſonable uſage, for here the common burgesſes who have no right in the election under the charter, have it in their power to diſſolve the corporation by their neglecting to return five; or if it were good, yet it can only have allowance in caſes where they do nominate, and if they do not, then the capital burgesſes may make the election under the charter out of the whole body.

Per curiam, This is a good uſage, being to avoid popular confuſion; but here the election purſues neither the charter nor the by-law. It is not under the charter, for that ſays it muſt be out of the capital burgesſes at large, and here they confined themſelves to eight; nor is it according to the uſage, becauſe more than five were nominated, which brings in all the confuſion that was deſigned to be avoided by that proviſion. *Judicium pro defendente*.

Anonymous.

MANDAMUS to the ſeſſions, to proceed on an appeal; they return that the appeal was diſmiſſed for want of fix days notice, which by a former order they had appointed to be given of every appeal. Serjeant *Whitaker* ſaid, they ſhould have adjourned it, and not diſmiſſed it. *Sed per curiam*, The return was allowed, for they are the propereſt judges of a point of practice at the ſeſſions; and all courts muſt have ſtated rules to go by.

Sessions may diſmiſs an appeal for want of ſuch notice as their practice requires.

Dominus Rex *verſ.* Inhabitantes de Stroud.

AN order for impoſing a rate towards the repairs of the highways was quaſhed for two exceptions: 1. Becauſe it did not appear but that the ſtatute labour was ſufficient. And 2. Becauſe only the *occupiers of land* are charged, whereas others are equally liable.

Order for repair of highways muſt ſhew the ſtatute labour not ſufficient.

Dominus

Dominus Rex *vers.* Baker.

In convictions
ill for the wit-
ness to swear
the defendant
is guilty ge-
nerally.

CONVICTION for taking pilchards, *contra formam statuti*, quashed, because the witness swears generally, that the defendant is guilty of the premisses, and that is taking upon himself to swear the law.

Dominus *vers.* Tilly.

Informer no
witness, where
intitled to part
of the penalty.

A Conviction for deer-stealing quashed, because the same person is both informer and witness, and is intitled to a part of the penalty.

Ingoldfby *vers.* Martin.

Pas. 6 Geo. rot. 104.

Earl a suffi-
cient descrip-
tion, though
the Christian
name is mista-
ken.

IN error of a judgment by default, want of an original was assigned, and a *certiorari* returned, that there was none: upon which the defendant in error comes and alleges diminution, and brings up an original of the term in the *placita*, and then pleads *in nullo est erratum*.

Strange pro querente in errore, excepted to the second *certiorari* and return, that it had not falsified the error assigned, it being an improper return, for that the writ was directed to *Henry Earl of Litchfield, custos brevium de C. B.* and the return is made by *George Henry Earl of Litchfield*, who is a different person: and it will be no answer to say he calls himself the *custos brevium infranominat'*, for that was the general answer offered to the exception taken in *Nutton v. Crow* and several other cases, where the writ was directed to *Sir Thomas Trevor, Knt.* and returned by *Thomas Lord Trevor*; and it was again relied upon in the case of the *Archbishop of Dublin* and the *Dean of Dublin*, Mich. 5 Geo. where the writ was *Whitchett* and the record *Whitched*: and the court held it was not reconciled by the averment of his being Chief Justice.

Sed per curiam, There can be but one Earl of *Litchfield*, and therefore according to 1 *Inst.* 3. a. a variance of the *Christian* name is not material.

Variance.

Then it was moved to quash the writ of error, which was, *inter Jacobum Martin nuper de Westm' in com' Middlesex gen'*, and the record

record is only *nuper de Westm' gen'*. So the excess lies in the description, and not in the record, which difference has been often taken and allowed, particularly in the case of *Alston v. Lucan*, where the writ had the word *junior*, which was not in the record.

Sed per curiam, There is *Middlesex* in the margin, and so it is well enough. Judgment affirmed.

Jernegan *vers.* Harrison.

DEBT upon a bond: the defendant prays *oyer* of the condition, which appears to be for the payment of money on the 23d of *March*, and then pleads payment on the 22d of *March* in the condition mentioned. Duplicity.

The plaintiff replies, that he did not pay the money either on the 22d or the 23d, or at any time after making the bond. And the defendant demurs for duplicity.

Strange pro defendente would have argued against the replication. *Sed per curiam*, You need not labour that, for it is certainly ill; but then so is their plea, and the declaration must stand; for if the plaintiff had gone to issue upon the plea, the verdict must have been set aside, as in the case of *Merril v. Jocelyn*.

As to this, *Strange* took a difference between this and the common plea of payment before the day: he admitted it ought to have been pleaded by way of accord and satisfaction. 5 Co. 117. But as it was, he said the plaintiff might have taken a safe issue by *non solvit modo et forma*; for the payment is pleaded absolutely, and the time introduced under a *scilicet*, and then *modo et forma* would not make it parcel of the issue. But the plaintiff had judgment. *Solvit ante diem, ill.*

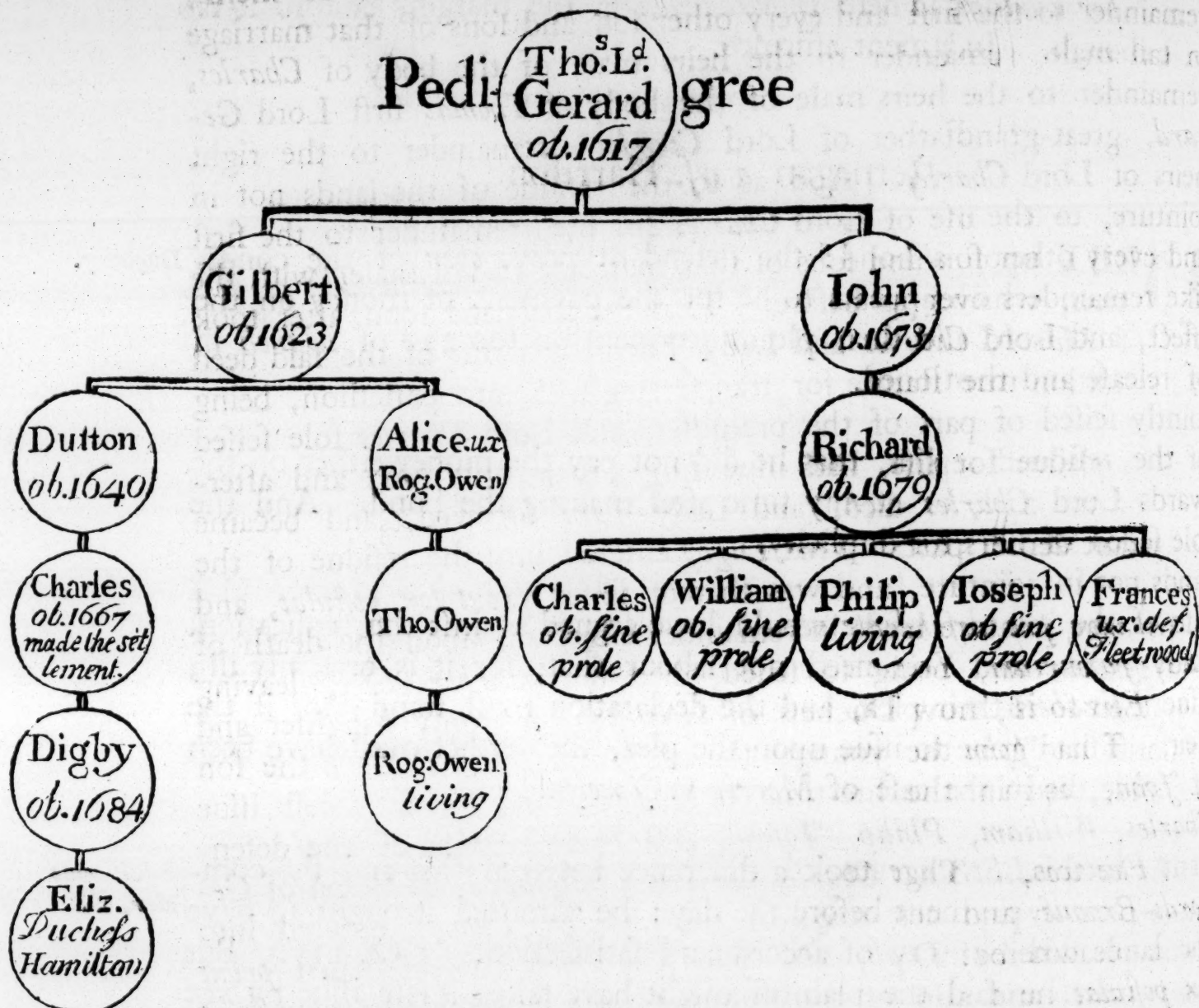
Shadford *vers.* Houstoun.

THE court ordered costs for not going on to execute a writ of inquiry, as they used to do for not going on to trial. Costs for not executing inquiry.

*S.L. com. 207.
10. Mod. 113.
35b. 406.*

Thornby *vers.* Fleetwood et al.

Int. in C. B. de Trin 9 Annae, rot. 1842.



Of the effect
and conse-
quence of a
foreign edu-
cation in a
popish semi-
nary.

UPON Not guilty in ejectment for lands in the county of *Stafford* on the demise of the most noble *James Duke of Hamilton and Brandon and Elizabeth* his wife, on a trial at bar in the court of Common Pleas, the jury find this special verdict.

That *Thomas Lord Gerard* had two sons, *Gilbert* and *John*, and died 1617. That *Gilbert* (the elder) had issue *Dutton* and *Alice*, and died 1623. That *Dutton* had issue *Charles*, who had issue *Digby*, who had issue *Elizabeth* now *Duchess of Hamilton*, lessor of the plaintiff. That *Alice* the daughter of *Gilbert* married *Roger Owen*, Esquire, and had issue *Thomas*, who had issue *Roger Owen*, now living. That *John*, the younger son of *Thomas* and brother of *Gilbert*, had issue *Richard*, who had issue *Charles*, *William*, *Philip*, *Joseph*, and *Frances* wife of the defendant *Fleetwood*. This being

the pedigree, they further find, that *Charles* the son of *Dutton*, being then Baron of *Gerards-Bromley*, and seised in fee of the premises in question, by lease and release dated 28 and 29 November 12 Car. 2. conveyed the same to trustees to the following uses. As to part of the lands to the use of himself and the Lady *Jane Digby* his intended wife, for their joint lives and the survivor of them; remainder to the first and every other son and sons of that marriage in tail male, remainder to the heirs male of the body of *Charles*, remainder to the heirs male of the body of *Thomas* first Lord *Gerard*, great-grandfather of Lord *Charles*; remainder to the right heirs of Lord *Charles*. And as to the residue of the lands not in jointure, to the use of Lord *Charles* for life, remainder to the first and every other son and sons of that marriage in tail male, with the like remainders over as before. That the marriage soon after took effect, and Lord *Charles* and Lady *Jane*, by virtue of the said deed of release and the statute for transferring uses into possession, being jointly seised of part of the premises, and Lord *Charles* sole seised of the residue for life, had issue *Digby* their only son: and afterwards Lord *Charles* died, and Lady *Jane* survived, and became sole seised of her part. That *Digby* entered into the residue of the lands not in jointure, and was thereof seised *prout lex postulat*, and also of the jointure lands in remainder expectant upon the death of Lady *Jane*; and being so seised, died 8 November 1684, leaving issue *Elizabeth*, now Duchess of *Hamilton*, his only daughter and heir. That *John* the younger son of *Thomas*, and *Richard* the son of *John*, died in the life-time of *Digby*; and *Richard* left issue *Charles*, *William*, *Philip*, *Joseph*, and *Frances* wife of the defendant *Fleetwood*. That *Charles* the son of *Richard*, as Baron of *Gerards-Bromley* and heir male of the body of *Thomas*, entered into the lands whereof *Digby* died seised, and was thereof seised *prout lex postulat*, and also of the jointure lands in remainder expectant upon the death of Lady *Jane*. But the jury further find, that *Charles*, *William*, and *Philip*, sons of the said *Richard*, in the life-time of *Richard* and *Digby*, 1676, (being then infants under the government of their father, and he being then a subject of King *Charles* the Second, and under his obedience in the kingdom of *England*) by the said *Richard* their father were sent, did proceed, go and pass out of the said kingdom of *England* into parts beyond the seas, out of the obedience of the said King, viz. to *St. Omers*, and at and in a popish seminary or college of jesuits, under the obedience of the King of *Spain* then being, there to be educated in the popish religion and superstition used in the church of *Rome*; and did there reside for the space of five years amongst jesuits and papists, and during that time were instructed and educated in, and did profess that religion. That *Charles* in 1681, and *Philip* in 1693, returned into *England*. That *Charles*, after the death of *Digby*, 22 May 1685,

1685, granted the lands to *Whitgrave* and *Jervis*, and their heirs, to make them tenants of the freehold till a common recovery was suffered, which was accordingly had and suffered *Pasch. 1 Jac. 2.* to the use of *Charles* and his heirs. And then *Charles* in consideration of 10,000 *l.* portion with *Mary* his intended wife, grants the same lands to uses which by the death of *Charles* without issue of that marriage are all extinct, except a rent-charge of 1000 *l. per annum* to Lady *Mary*, who is still living. That 27 October 1703 Lady *Jane* died seised of the jointure lands, and *Charles* entered and suffered a common recovery, to the use of himself in fee. That *William* and *Joseph*, sons of *Richard*, died without issue in the lifetime of *Charles* their brother. That *Charles* always from his going beyond sea to the time of his death was and continued a papist, and died 21 April 1707, without issue, nor was his wife then pregnant. That *Philip*, brother to *Charles*, is living, and heir male of the body of *Thomas*; and always from his going beyond sea was and did continue a papist, and is so now, using and exercising the said popish religion. That *Mary*, widow of the second *Charles*, is living. That *Roger Owen*, Esquire, grandson of *Alice* the daughter of *Gilbert*, is now living, and the next protestant of kin to *Philip Gerard*. That immediately after the death of the second *Charles* Lord *Gerard*, the defendants *Fleetwood & al'* entered, and were seised *prout lex postulat*, upon whose possession the Duke and Duchess of *Hamilton*, in right of the Duchess, did enter and were seised in manner aforesaid, and made the lease to the plaintiff, who entered, and was possessed till ejected by the defendants. But whether, upon the whole matter, the re-entry of the defendants be lawful or not, the jury pray the advice of the court: *Et si pro quer', pro quer' ; et si pro def', pro def'.*

The great question in this case is, whether upon this state of the fact, the statute of 1 Jac. 1. c. 4. will have wrought such a disability, upon account of the foreign education of *Charles* and *Philip*, as that in judgment of law the remainder to the heirs male of the body of *Thomas*, the common ancestor, (the death of *Digby* without issue male having determined all the former limitations) must be taken to be spent, so as to let in the Duchess, who is the reversioner. If it has, then it is with the plaintiff, otherwise it is with the defendants.

The matter in law upon this special verdict was argued three several times at the bar in C. B. Trin. 11 Annae, by Serjeant *Hooper* for the plaintiff, and Serjeant *Pengelly pro def'*; in Mich. following by Serjeant *Pratt pro quer'*, and Serjeant *Selby pro def'*; and Hil. sequen' by Sir *Thomas Powys pro quer'*, and Serjeant *Cheeshyre pro def'*. But the same persons having argued it again in B. R. upon the writ

of error, where the matter was taken up more at large; I shall omit the arguments they made *in C. B.* and take notice only of the resolution of the court, which was delivered by Lord Trevor, C. J. *Pasch. 12 Ann.*

Lord Trevor, after stating the heads of the special verdict, went on as follows. The plaintiff's title depends upon the construction of the several acts of Parliament of 1 Jac. 1. c. 4. 3 Jac. 1. c. 5. and 3 Car. 1. c. 2. For the lessors of the plaintiff must intitle themselves to the lands in question upon some disability wrought by one of those statutes, which disability must enure to make the recovery suffered by the second Lord Charles to be void, and work a determination of the precedent estate-tail, or at least a present *cesser* of it: and since the estate-tail is not absolutely determined; as it is not, because Philip who is heir in tail is still living, and may have issue who may be inheritable to the estate-tail; therefore the lessors, who claim after that estate is determined, cannot entitle themselves to enter, unless some or one of those acts of Parliament give a title to them so to do; for if those recoveries are good, their remainder is barred; or if they are not good, yet if the estate-tail has in judgment of law continuance, they cannot enter by virtue of that remainder.

The only act insisted upon by the counsel for the plaintiff is the act of 1 Jac. for the other subsequent acts cannot intitle them, and the question upon them is only how far they have altered the act of 1 Jac. Therefore the counsel did endeavour, with a great deal of art and ingenuity, to shew, that the act of 1 Jac. had so far disabled Lord Charles to take the estate-tail by descent, that the recovery suffered by him was void, and that the same disability being still upon Philip, and there being no person in being who can take the estate-tail, they must be intitled, as if it was actually spent: then as they insisted, that this act wrought such a disability; so they endeavoured to shew, that this act is still in force, and not repealed or any wise altered by the subsequent acts of 3 Jac. or 3 Car. for I did not observe they insisted (nor was there any foundation so to do) that either of those two later acts could give any title to the plaintiffs, for 3 Jac. gives the pernanacy of the profits, in cases of disabilities under that act, to the next protestant of kin; and the act of 3 Car. gives the forfeiture to the crown upon conviction.

So that this case will depend upon two things to consider,
1. What is the operation and effect of 1 Jac. admitting it still in force, and as if the other acts had never been made. 2. How far

that act does still continue in force, and whether it be repealed or any wise altered by the subsequent acts; or either of them.

I. To consider what construction must be put upon the statute of 1 Jac. That act says, "If any person shall pass or go, or shall send or cause to be sent any child or other person under their government, into any parts beyond the seas out of the King's obedience, to the intent to enter into or be resident in any college, seminary or house of jesuits, priests, or any other popish order, profession, or calling whatsoever; every person so sending or causing to be sent any child or other person shall forfeit 100 l. *And every such person so passing or being sent beyond seas to any such intent or purpose shall, as in respect of him or herself only, and not to or in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy, any manors, lands, &c.*"

Then there is a proviso, "That if any person or child so passing, sent, or then being beyond seas as aforesaid, should after become conformable and obedient; during such time as they shall continue in such conformity and obedience, they shall be freed and discharged of every such disability and incapacity."

I would observe first, as this act is penned, it was very difficult to determine what the effect of this clause would be, and what would be the consequence of that disability, and who should have the lands during it; for in these particulars the act is silent, therefore these things must be left to the construction of law, because there is no express declaration who shall have the lands in the mean time.

The counsel for the plaintiff have endeavoured to construe this act in such a manner, as would have a different effect upon lands that were descended before the disability incurred; for they seem to admit, that if lands were descended to any one that did afterwards incur this disability, it would disable him only to receive the profits; but they said, where the disability is precedent, it ought to be construed so as to prevent any descent.

Now I would observe, that this would be a pretty extraordinary construction, thus to distinguish between lands coming before the disability incurred, and all those cases that may happen upon this act: for though this construction will provide for the case before us, yet it renders the act wholly ineffectual as to all other cases that may be upon it.

Suppose it had been the case of an estate in fee, that was to descend to a person disabled; according to this construction the estate could never descend upon him; who then shall have it? It cannot be pretended his next heir shall enter in his life-time, for he is not heir to him, he cannot claim the estate till his death: the disability is only personal, and the act says it shall not prejudice the heir, but that after the death of the ancestor he may inherit, but it does not say he shall take in the life of the ancestor. So that if this be the construction, there is no body to take; the consequence of which is, that the disability is of no use, for though the party be disabled, yet if nobody has a right to enter, he may keep it himself, since nobody else can recover it against him.

This would be the case upon this construction, where an estate in fee descended: then put the case of an estate purchased by one disabled: the act disables him from purchasing, but nobody will say but that the estate shall vest in him, so that his heir may claim through him. An heir cannot claim through a purchaser, if the purchase did not vest in him; so that this case too would be unprovided for upon this construction, for the heir cannot take in the life of the ancestor.

This was compared to the case of a monk or a person professed, but they are not alike; for there the disability is grounded upon the maxim in law, that one professed is civilly dead, but it cannot be said that a person disabled by this act is dead in law, for it is not an absolute disability, but only during nonconformity. As to the case of lands descended before the disability incurred, it was admitted, that the estate and interest should continue in him; but that the act is to have this effect, to disable him to take the profits; and if in that case, why not so in the other?

As this is the natural, so it is the legal construction: it is not expressed, who shall have the land; but the act having inflicted this disability for a publick crime against the government, I think the construction of law is, that the land during the disability should go to the crown. Where an act inflicts a pecuniary penalty, or a disability; if the Parliament doth not declare who shall have it, the crown must have it; otherwise the act is wholly ineffectual: and the King being the head of the government, all penalties for publick offenses go to him. Indeed where a particular person has a private injury, the law may give him the penalty by way of recompense; otherwise the crown has the forfeiture; and so it was resolved in the case of *Woodward v. Fox*, 2 Vent. 269. where an arch-deacon sold the office of register, and the question was, who should have

have the forfeiture? It was adjudged, that the crown should have it. So it is in many other cases, for if you do not give the forfeiture to the crown, you cannot give it to any body else by implication: you cannot give it to one subject more than another.

And as the matter rested on the act of 1 Jac. as it was doubtful who should have the benefit of the disability, so it was more doubtful in what manner the crown should have it, whether before conviction or after; by office or inquisition; so that as the forfeiture was uncertain, the method was also uncertain: and these doubts upon the penning of the act did in a manner render it ineffectual.

But however this might stand upon the act of 1 Jac. if that was the only act, I think that by the act of 3 Car. it is explained and altered, so that since that act it will be much plainer than it was. But before I consider that act, let us see how it stands upon 3 Jac.

Now the words of that act are to this purpose, "That if the children of any subject (not being soldiers, mariners, merchants, &c.) to prevent their good education in *England*, shall be sent or go beyond the seas without licence, every such child or children so sent shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any lands, &c. and the next of kin, which shall be no popish recusant, shall have and enjoy the said lands, till such time as the person so sent shall conform; and the person so sending shall forfeit 100 l."

As to this act, I do not think it has made any alteration of the act of 1 Jac. for it seems that this act was made for another purpose, to prevent going beyond sea without licence, and this is a distinct thing from what the former act prohibited; for by this act, if they had a licence, they incurred none of the penalties; but if they went with intent to be popishly educated, they would incur all the penalties of 1 Jac. This act never intended to repeal 1 Jac. but was made to prevent their going beyond sea upon any pretence whatsoever, without licence; so that it is plain, this has not altered the other: and this seems to be an answer to *Tredway's* case, *Hob.* 73. for that was founded on 3 Jac. and the offense was going without licence, and it doth not appear she went with an intent to be bred up in a popish seminary, though it appears she was afterwards a nun professed. So that case doth not at all influence this.

The next thing to be considered is the act of 3 Car. how far that act has either repealed, altered, explained or enlarged the act

act of 1 Jac. and in order to form a right judgment of this matter; all the parts of this act are to be considered, and compared with the provisions in 1 Jac.

The title of this act is, "To restrain the passing or sending of any to be popishly bred beyond the seas;" to lay a further restraint on that great inconvenience, that was found to grow every day, notwithstanding the act of 1 Jac. so that it seems to be made to prevent those inconveniencies, by some provisions that were not made in the first act. And it seems that this act was made to the same intent and purpose with the first.

The next is the preamble. "Forasmuch as divers ill affected persons to the true religion established within this realm have sent their children into foreign parts, to be bred up in popery, notwithstanding the restraint thereof by 1 Jac." Therefore the first enacting clause is, that that statute shall be put in due execution: the next enacting clause extends to all the cases comprized within the act of 1 Jac. and to several that are not within that act. For 1. It extends to persons sent into any *private* popish family beyond sea, which was not a case within 1 Jac. that extending only to some *publick* college or seminary. 2. In the next place this act extends to the sending any sum of money for the maintenance and relief of any such child, so sent abroad, or under colour of charity. Then it inflicts the same penalty on the person sending and the person sent, whereas by 1 Jac. the person sending forfeits only 100 l. with this difference between the sender and sent, that the last is discharged upon conformity, but there is no provision for the sender. It is further observable that these penalties and disabilities are only upon conviction.

Now the penalties here, are all the penalties in 1 Jac. and some more: they are not capable of bringing any action or suit at law or in equity, nor to be committee of any ward, or capable of any legacy, or to bear any office; none of which were in the act of 1 Jac. *And further shall lose and forfeit*, (in the same words as 1 Jac.) and mentions who shall take the advantage. Those are the same penalties with respect to the person, as are in 1 Jac. but it was not said who shall take the advantage of them; therefore this act says, he shall forfeit to the crown upon conviction: so that this act seems to be made as a further and clearer provision against the mischief, to prevent which 1 Jac. was made.

Then there are two provisoes in this act relating to conformity, which differ from that in 1 Jac. First, That if the person shall conform *within six months after his return*, he shall not incur the penalties;

penalties; whereas by 1 *Jac.* he was to be discharged upon conformity at any time. Then the other proviso is, that upon conformity at any time he shall be restored to his land, but that does not go to the other disabilities: so this act, as it has much enforced 1 *Jac.* so it goes further, and has made alterations in point of conformity.

I would now make some observations, to shew that this act of 3 *Car.* (though it is not a repeal of 1 *Jac.*) yet it has enlarged, explained and enforced it, so that now the measure of the disability to be incurred by 1 *Jac.* is to be governed by 3 *Car.*

It was insisted on by the counsel for the plaintiff that this act of 3 *Car.* should not be construed to repeal 1 *Jac.* because the first clause says, that act shall be put in due execution: I do not think it is a repeal, but that clause coming immediately after the preamble, may very naturally be construed to be put in to shew, that though the act was altered for the future, yet as to all cases and offenses that had been committed against that act before 3 *Car.* it should remain in force, which offenses could not be punished by 3 *Car.* it having no retrospect.

In the next place I would observe, that this act of 3 *Car.* is far from repealing 1 *Jac.* for the provisions made by 3 *Car.* are for the better execution of 1 *Jac.* therefore it was natural enough for them, at the time when they were making provision for the better execution of that act, to say, it shall still be put in execution; for they were providing for several things not sufficiently provided for before, so that the putting in execution this act of 3 *Car.* may properly be said to be putting in execution the act of 1 *Jac.* for it has strengthened that law, by appointing to whom the forfeiture shall go, and in what manner it shall be taken advantage of by the crown, viz. upon conviction.

It must be admitted, that upon 1 *Jac.* either the forfeiture must be to the crown by implication, and then 3 *Car.* only expresses what was implied before. Or if it should not receive that construction, then it must be agreed, that act would be defective in most cases that would happen upon it, and the person disabled, being in possession, must hold the land, because no body could make a title against him: I say, in most cases; for in the case at bar, the counsel insisted, that the remainder man might enter, as if the estate-tail were spent; but that will not answer all the other cases that may be upon this act, for if it were the case of an estate-tail that descended before the disability, there might be a recovery suffered of that, and the estate might be barred. In case of an inheritance in fee descended,

scended, either before or after the disability, or in case of lands purchased, or which should come in the nature of a purchase, there would be no body intitled to the lands in the life-time of the disabled person; therefore this act of 3 *Car.* seems to be the rule by which the disability is to be governed, and it shews what is to be the consequence of that disability, *viz.* a forfeiture to the crown upon conviction.

The counsel for the plaintiff seem to allow, that 3 *Car.* should have an effect upon some lands, and they said the forfeitures therein mentioned should extend to lands that were descended before the disability, or to lands which were purchased, and that these might be forfeited to the crown; but that it should not extend to lands that came after the disability, for that they never vested in him.

But as to this I would give this answer. I think upon the act of 1 *Jac.* the construction would have been to give it to the crown in all cases. If that be so, it will be a full answer, and this act of 3 *Car.* will be only explanatory of what the law was before. But if that were not so; if it did not go to the crown by 1 *Jac.* but did enure for the benefit of the remainder man; yet it must be admitted, that this point was doubtful at that time when 3 *Car.* was made: it was a point that had never been settled; and if it was doubtful, and 3 *Car.* was made to explain those doubts; shall it be explicatory only of some things that were doubtful, and not of all that were so? especially when the words are so general, that they may extend to all cases. It seems to me, that this act must extend to all those doubts, and to explain the former act so far, as that all those penalties should go to the crown upon conviction.

Upon the whole matter: if this case depended only on the construction of 1 *Jac.* and there had been no other law, though that act had not expressed that the forfeiture should go to the crown, yet I conceive, the disability being inflicted for a publick crime, the forfeiture must enure to the crown; or if it did not, yet it could not intitle the lessors of the plaintiff to enter, whilst the estate-tail continues. For though there is a personal disability in *Philip*, yet it is but personal, and the estate-tail must continue for the benefit of the issue. If he had issue born, no body could pretend, that the plaintiff could enter; and though he has not, yet he may have issue.

In the next place the act of 1 *Jac.* being so doubtful in this point, who should have the benefit of this forfeiture, the act of 3 *Car.* being made to enforce that law, does so far explain it, that this last act is the measure by which we are to construe this disability.

Accordingly

Accordingly judgment was given for the defendants. And the plaintiff brought a writ of error in *B. R.* and the general errors assigned, *Hil. 1 Geo. rot. 564.* And *Mich. 2 Geo.* it was argued by Mr. *Fortescue* for the plaintiff, and Serjeant *Pengelly* for the defendant.

V *Fortescue.* In this case I shall make three points: 1. Whether the recovery suffered by the last Lord *Charles* be void, as suffered by one who was out of possession, and consequently could not make a good tenant to the *praecipe*? 2. Whether *Philip's* being alive, who is heir male of the body of *Thomas* first Lord *Gerard*, be such an impediment, as that the reversion cannot be executed in the lessor of the plaintiff as right heir of the first Lord *Charles*. 3. Whether the statute of 3 *Jac.* or 3 *Car.* have altered or repealed the act of 1 *Jac. c. 4.*

The first point, whether the recovery be good or not, depends solely on the words of 1 *Jac.* "That every person so passing, &c. shall in respect of him or herself only, and not to or in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have or enjoy any, &c." Therefore *Charles's* being out of the realm was a disability in him, so as he could not take the estate when it should have vested in him. By this clause, omitting the words (*in respect of himself and not in respect of his heir*) the act intended that the offender should take nothing, either for the interest of himself, or any other; and by a subsequent clause all estates and conveyances made to such person or to his use are void.

There is a difference between a disability by act of Parliament, and a disability at common law; yet considering this as a disability at common law, the law never throws any interest upon a person disabled. If an alien purchases lands to him and his heirs, albeit he can have no heir; yet he is of capacity to take, but not to hold, for upon office found, the King shall have it. If a man be attainted, he is of capacity to purchase, but not to hold; for he can only purchase for the benefit of the King; he can neither have an heir nor be heir to any man, for by the attainder his blood is corrupted. 1 *Inst. 2. b. 8. a.* 1 *Ven. 417.* Now though an alien may take by purchase by his own contract that which he cannot retain against the King, yet the law will never enable him by act of his own to transfer by hereditary descent, or take by act in law, for the law, *quae nihil frustra*, will not give an inheritance to one who cannot keep it.

If the common law be so, that an estate will not vest in a person disabled, the case at bar is much stronger, for this incapacity is by act of Parliament. The words are, *shall be disabled and made incapable*, so that he is disabled to take, either for his own or the crown's benefit. The clause as to the heir can be only declaratory and explanative, for words affirmative implying a new law, infer a negative, for the words precedent were full before, *he shall not take*, that is, he himself in his own person shall not take, but his heir shall. The reason of inserting the clause therefore was only to satisfy the scruples of the ignorant as to the difference between a temporary and a total disability, as in the case of attainder, though the difference may be well known amongst lawyers. Where one is attainted of treason or felony, that is an absolute and perpetual disability by corruption of blood, for any of his posterity to claim as heir to him, or any ancestor paramount; but when one is disabled by act of Parliament, to claim any estate for life, that is a personal disability for his life only, and his heir after his death may claim as heir to him or any ancestor paramount. 11 Co. Lord *Delaware's* case. Where *Thomas Delaware* petitioned the Queen for his place in the House of Lords, which his great grandfather had, though *William* his father was disabled by Parliament, 3 E. 6. during his life, to claim any dignity: and it was objected, that his father being disabled by act of Parliament, the petitioner could not convey the descent to himself through the disabled person; but the Judges and House of Lords were of opinion, that he might claim by him, this being only a personal temporary disability, which differs from an attainder.

Though nothing vested in the ancestor, yet the heir may take. The clause *not in respect of his heirs* can signify nothing, the disability extending only to the recusant himself: it is not during life, but only till conformity. This case being a limitation in tail, will be different from what it would be if a fee was limited, for the estate-tail is by the statute *de donis*, and the issue in tail cannot be disabled, but must take by the statute. Therefore if tenant in tail is attainted of felony, and has issue and dies, although by the attainder the blood is corrupted, so that nothing can descend to his heir; yet the issue in tail, as to those lands, is not barred, because he is inheritable by force of the statute *de donis*, but the wife of tenant in tail shall lose her dower, because she claims by the common law. *Lit.* § 746, 747. In this case tenant in tail himself may have a right to take, that so it may descend, to enable the issue in tail to inherit, but he does not take such an estate as that he shall have power to alien. A feoffment by tenant in tail gives away all the estate tenant in tail had, as concerning himself, or any benefit

that he may receive; but for the sake of his issue, and him in reversion, there still remains *in him* a right of that intail by force of the statute. And by that right the tail may be recovered again, as by the root which is still alive, and the heir shall bring a *formedon in descender*, and lay in his count, *descendit jus* from that ancestor to him as heir *per formam doni*. *Hob.* 335, 337. *Raym.* 354. *2 Roll. Rep.* 418. For the statute *de donis* says, that notwithstanding an alienation by tenant in tail, the land shall remain to his issue, and so says our statute.

It may be objected that it is impossible for the heir to take unless the ancestor was seised, and therefore the estate must vest in the recusant. To this I answer, That at common law it is not necessary, that the ancestor be seised, to enable the heir to claim by descent; for the rule of law is, that where the ancestor *might* have taken the estate and been seised, there the heir shall inherit. *1 Co. Shelley's case*. Nay in some cases the heir shall take by descent, although the ancestor never was or could be seised of that estate; as if lands be given to *A.* and *B.* for their joint lives, remainder to the right heirs of him that dies first; *A.* dies; his heir shall take by descent, and yet the remainder never vested during the life of *A.* *Co. Litt.* 378. *b.*

But even admitting that this act of Parliament cannot have this construction, and at the same time agree with all the strict rules of the common law; yet when by an act of Parliament estates are limited for particular purposes, the validity of those limitations must not be measured by those strict rules, for it is supposed the act was made purely for a repeal of those rules or maxims, and the mechanick rules of reason shall not obstruct the intent of the act, for the statute over-rules all private rules of law. *3 Co.* 64. *b.* *6 Co.* 40. *b.* *8 Co. Prince's case*. An estate-tail may be barred and cease for a time, and afterwards revive again: it may cease as to one person, and be in force as to another. *9 Co. Beaumont's case*. *J. B.* and his wife were tenants in special tail, he alone levied a fine, and died leaving issue; during the life of *J. B.* the intail was barred, and nothing was left but a possibility to the *feme*; for if she survives, she shall be tenant in tail as before, for the whole tail revives and is restored to her.

An estate-tail may in its self be perfect and alienable, and yet may not descend, though there be issue in tail. *Archer's case*; and *Hob.* 258. An estate-tail may descend, and yet it cannot be aliened. *3 Co.* 50. It may be full, and yet cannot be aliened or descend, as in *Beaumont's case*, it could not descend to the issue from the mother though she had the whole estate-tail in her, because the
issue

issue was barred before by the fine levied by the father; and it could not be aliened by the wife, because it was aliened before by the husband. *Hob. 257.* Though those points are singularities, and contrary to the known rules of law, yet they being introduced by statute, must not be carried to the rules of law as to their standard. The rules of law as to inheritances are arbitrary, and do not depend on the rules of reason; and that is the reason why the rules of law vary in different countries.

Objection. That the estate must vest in the offender, because the proviso says, that the offender conforming shall be freed and discharged of all and every such disability and incapacity; and there being no clause of restitution, the party conforming would have no benefit of his conformity, unless the estate always remained in him.

Answer. This objection is capable of the former answer; that an act of Parliament enacting such things, they ought not to be impugned, because they are inconsistent with the rules of law. But this admits of another answer, that it was not the meaning of the act, that the party conforming should be restored to that estate which was once vested in the next protestant; but the meaning of it was, that he should from thenceforwards be able to take any other estate, not to have that estate which was once forfeited, for he could not take it again by purchase or descent. Such a construction as is contended for on the other side, instead of weakening, would very much encourage popery, and give recusants an opportunity to play the hypocrite; for if by his conformity the estate should be re-vested in him, he would conform outwardly, go to church, receive the sacrament, and be obedient to the laws for awhile, and then get a dispensation and re-enter, and so *toties quoties*, which would be to evade the act.

The preventing our youth from being sent into popish seminaries, to suck the poison of their pernicious principles, and stir up the subjects to rebellions and tumults, is the greatest bulwark to the protestant religion. The taking the estate by the ancestor for the benefit of the heir, as is contended for, is in short giving the recusant a power by a recovery to bar his heir, and dispose of it as he pleases, which overthrows that clause, the intention of which was to preserve the estate for the heir.

2. The life of *Philip* is objected to be an impediment, that prevents the execution of the reversion, for whilst he lives say they, the estate-tail continues. But I give the objection this answer. That *Philip* can take nothing, no more than *Charles* did: the rule of law is, that where any limitation is to a person not *in esse*

esse at the time the estate ought to vest, the estate must go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when that limitation ought to take effect, he is incapacitated to take, and then the limitation over to the lessors must take effect immediately. *Cro. El.* 422. Devise to *R.* in tail, and after his decease without issue to *Edward* his son in tail: *R.* dies leaving issue, living the testator, and there it was held, that *Edward* should have the estate presently, and not wait till the death of *R.*'s issue. 2 *Roll. Abr.* 415. C. 6. Devise to one for life who is a monk, remainder over is good. If a man dies seised leaving issue only an alien, the land shall escheat immediately, and not come to the crown. If a man has issue two sons, and the eldest be an alien, the law takes no notice of him, and therefore as he shall not take by descent himself, so he shall not impede the descent to his younger brother, on supposition that he may have issue a natural born subject.

In respect to the incapacity, an alien resembles a person attainted, with this difference, that a person attainted is one that the law takes notice of, and therefore if he be an eldest son and survives his father, he shall hinder the descent to the younger son, though he cannot take himself. 2 *Ven. Collingwood v. Pace*. An alien, or person attaint, may purchase; because it is their own act, which the law cannot hinder; but it disables them from taking by descent, and impedes the descent from them, because they must there come in by act of law, and the law will not trust them with an estate.

If it be contended that during the life of the offender the estate shall be in abeyance: I answer, There is no cause to frame abeyances needlessly, which the law loves not, nor admits, but in case of necessity. If in this case the land should be construed to be in abeyance, then it must be framed against the benefit of the church, whereas it ought to be only for its benefit. *Hob.* 338.

3. Whether the statute of 1 *Jac.* be still in force. And 1. To consider it with respect to 3 *Jac.* this last relates to a quite different matter, for though both are levelled at popery, yet the offenses are distinct. In 1 *Jac.* the intention of a foreign education is the offense, so that a man may offend against that statute, and be innocent as to 3 *Jac.* Again; a protestant may offend against 3 *Jac.* papists only against 1 *Jac.* By 3 *Jac.* the offender is capable of taking the legal estate, and loses only the profits till conformity, whereas the offender against 1 *Jac.* takes neither the estate nor the profits. The words of the 3. *Jac.* are, *that he shall take no benefit by descent*, not that he should not take by descent; and then the statute

statute shews the meaning, by giving the profits during his nonconformity to the next protestant of kin. *Hob. 73.*

2. And as 1 *Jac.* stands unimpeached by 3 *Jac.* so does it likewise by 3 *Car.* The first business of this latter statute is, to enact 1 *Jac.* to be put in due execution, which could not be, if the law-makers had intended it for a repeal. Besides the effects of these statutes are different, for by 1 *Jac.* the recusant is disabled to take the lands which were not vested, but by 3 *Car.* he only forfeits what is vested; for the words are *shall forfeit all his lands*: so that these two statutes are very consistent, for 3 *Car.* was made as a farther provision to 1 *Jac.* for that only prevented the vesting the lands after his recusancy, so that a person in possession before his offence could feel no effect of 1 *Jac.* and therefore to adapt the punishment to both cases the statute of 3 *Car.* came and took away the estate vested. But as in the case at bar the disability was attached in *Charles* and *Philip* before the descent of the estate on either of them, therefore the statute of 1 *Jac.* must be the measure by which this case must be ruled; and then it follows, that no estate ever vested in *Charles*, and he having no possession the recoveries are void, and *Philip* being disabled, the land must go over to the lessor of the plaintiff as right heir of the first Lord *Charles*; the consequence of which is, that she had a good title to make the lease, and therefore the judgment must be reversed, and judgment given in this court for the plaintiff.

Pengelly Serjeant *contra*, argued, That under 1 *Jac.* the estate-tail vested in *Charles*, and would have descended to his issue, if he had had any. That the subsequent statutes have altered that penalty, and given the forfeiture to the crown upon conviction. That in this case there was no conviction. The consequence of which is, that the estate continued in him all his life, and the recoveries were well suffered by him.

But if these points should not be with me, yet under the first settlement there is an estate-tail subsisting for *Philip* and his issue, and therefore the reversioner cannot enter till the whole estate-tail is spent.

1. Then, the legal estate vested in the recusant, for the construction of the statute ought to be, that only the perception of the profits of the estate of the recusant, or at most some uncertain interest determinable on his conformity, ought to vest in the crown; so that the estate-tail vested in *Charles*, and would have descended to his issue male if he had left any, and had not barred them by the recovery. The words in 1 *Jac.* *that he shall be disabled to take in*

respect of himself, and not in respect of his heir, were not inserted in the statute by way of proviso, but are incorporated into the body of the act, to preserve the estate to the heir; lest the heir, who is innocent of the crime, should be involved in the punishment designed only for the offender. The act did not intend to prevent the inheritance from vesting in the recusant, and consequently prevent the descent to the issue *per formam doni*, for there is no clause to carry the estate to any other person, which provision is in all other statutes: as 6 R. 2. c. 6. which disables ravishers and women ravished consenting after the rape, to have any inheritance or dower, appoints the next of blood to whom the inheritance ought to descend, revert, or remain, to enter incontinently. So the 11 H. 7. c. 20. appoints him in remainder or reversion (as the case is) to enter on discontinuances by women. But this act had no view or design to abridge the estate given by the donor, or to hasten the interest of the reversioner; for the penalty was inflicted, not to affect the estate or inheritance of the recusant, but his person only; the heir was not intended to suffer any punishment, but on the contrary the act designed to preserve the right and estate of the heir. The clause, *that all conveyances shall be void*, can extend only to conveyances made to the recusant himself, or to his use, and not to conveyances made forty years before (that is to say) it can never affect the settlement of the first Lord Charles, ancestor to this Charles, for Charles and Philip were not such persons against whom the statute ordained this punishment, when this conveyance was made.

This act of 1 Jac. having then only disabled the recusant as to a small interest in the land; it follows, that the residue of the estate must remain in him. If the heir is to take any thing by this act, the estate must vest and continue in the ancestor during life; for the heir, whether he be a general or special heir, must derive his title by the rules of law under the settlement of the first Charles.

There is no difference, when the estate is vested, and when it is to vest; for it will be agreed, that by this statute lands vested are not to be divested from the recusant. Our objection is, that if there is a total disability in the ancestor himself, none can claim as heir to him, and that is proved by the case of *Collingwood v. Pace*, cited by the other side, and then this disability must destroy the settlement, and stop the blood; for if there be grandfather, father and son, and the father is attainted, though neither the blood of the grandfather, or son be corrupted between them, yet the corruption of the father's blood draws a consequential impediment upon the son to inherit to the grandfather, because the father's corruption of blood obstructs the transmission of the hereditary descent between the grandfather and the son. If tenant in tail is attainted of treason

or

or felony, and at the time of his attainder had no issue, and after the obtaining his pardon has issue, such issue is inheritable to him; but if he had issue before the pardon, the descent to such son is hindered, for the blood between him and his father is corrupted, which case contradicts *Litt. §. 76, 77.* for though the eldest son born before the pardon cannot take, nor the youngest son living the eldest, yet there is no *cesser* of the estate-tail upon supposition that the eldest will die without issue, and then the youngest son will inherit. In our case, if there is any right of the estate-tail remaining in the recusant, the reversion shall not be executed. In the case of Lord *Delaware* the disability was imposed for life, and the court held that one might claim as heir from a person disabled only by act of Parliament.

This construction which I am contending for of the intent of the clause in imposing only the forfeiture of some uncertain interest till conformity, will be supported by the proviso for conformity. By that clause the party conforming "shall for and during such time" "as he shall continue in such conformity, be freed and discharged" "of all and every such disability and incapacity." Now it would be strange, that the party complying with the act in conforming to these laws should not have the benefit of such conformity, that is, have the estate again; which he could not, if the estate was once vested in another, there being no clause of restitution. The intent therefore of the act was, that the party conforming should be in the same condition as before his offence, that is, receive the profits of his estate to his own use. An act of Parliament may indeed make an estate cease and rise again, as in *The Prince's* case, but then the words of that act must be express.

It may be demanded, to whom did the statute intend to give the profits of the estate? I answer, that forfeitures given by statute, either for nonfeasances or misfeasances, for publick offences, fines and penalties for offences at common law against the publick good (no person being appointed to take the benefit of them) shall go to the King, as *pater patriae*, the head of the government and fountain of justice, who is concerned to see the laws executed. But when the offence is private, and affects only particular persons; there it is but just and reasonable, the sufferer should have the forfeiture or fine for a compensation. In the case at bar the offence is of a publick nature, against the common good of the kingdom, and consequently the forfeiture accrues to the crown, according to the case of *Woodward v. Fox*, 2 *Vent.* 267. 3 *Lev.* 289. In 2 *Inst.* 650, on 2 *Ed. 6. c. 13.* the forfeiture of the treble value for not setting forth tithes was therefore by express words given to the owner of the tithes, and so is *Moor* 238. 1 *Roll. Rep.* 90. 11 *Co.* 60. 2 *And.*

2 *And.* 127. As to *Beaumont's* case, the fine by the *baron*, of the lands whereof the *baron* and *feme* were seised of a special tail, was no *cesser* of the estate-tail of the *feme*, and in that case it is not pretended that the estate-tail shall go over to the reversioner, whilst there remained issue of tenant in tail so levying the fine.

This construction, that the forfeiture shall go the crown, prevents all exceptions; but the other construction, that no estate vests, prevents the penalty designed by the statute; for if no estate vests, the crown cannot have the profits. The act intended no difference, whether the recusant had the estate before or after the offence, nor of the quality of the estate, whether it was fee or tail; but in reason, of the two the estate-tail ought to be more favourably construed to be preserved, the statute *de donis* taking so much care to preserve the estate for the issue against the alienation of the tenant in tail; and therefore by that statute the issue was not barred, though the father was attainted of treason, though it is since altered by the 26 *H.* 8. c. 13.

Besides, in this statute there are express words preserving the estate to the heir. It is more beneficial to the subject, that the crown should have the profits, than the next of kin, who may perhaps employ them under hand to the use of the recusant in all or in part: which bargain may be easily made, considering that he is but tenant at will to the offender, who whenever he pleases may conform, and take the land, and recover the mesne profits.

But admitting that no estate vests by 1 *Jac.* yet the recovery is good; for the right of the entail continued in *Charles.* 3 *Co.* 6. *Baron* and *feme* seised to them and the heirs male of the body of the husband, remainder to *B.* in tail: the *baron* alone levied a fine and suffered a recovery, in which he only was vouched, and not the wife who had a joint estate for life with him; yet it was adjudged, that the baron coming in as vouchee, came in in privity of the estate-tail, and not of any other estate, and so the recovery is good.

If the estate did not vest in *Charles*, then he is a disseisor, and that way the recovery is good. 3 *Co.* 59. *Lincoln Coll.* case. If there be tenant for life, remainder in tail, and he in remainder enters upon the lessee, and disseises him, and after suffers a common recovery; that shall bind the tail, for the disseisin does not divest the tail, but he is a disseisor of the estate for life only, and as to himself he is seised by force of the tail. 2 *Roll. Abr.* 395. C. 3. 6 *Co.* 32. And so he concluded this point, that the estate vests in the recusant, and only a perception of the profits is forfeited to the King:

King: or if no estate vested, yet the recovery is good, as suffered by a disseisor, and consequently *quacunqve via data* the lessor of the plaintiff can have no title.

2. But admitting that no estate vests in the offender, and that the recoveries are void, yet the plaintiff cannot recover: for if *Philip* cannot take himself, yet there is no *cesser* of the estate-tail, whereby the reversion can be executed in the plaintiff, till the death of *Philip* without issue, 1 *Inst.* 28. as long as any right of the estate-tail remains, the law looks for issue; and though the tenant in tail be 100 years old, yet the law sees no impossibility of his having issue; and *Litt.* § 34. is, that none can be tenant in tail *apres*, &c. but one of the donees in 'special tail, for a donee in tail general cannot be said to be tenant in tail after possibility, because always during his life there is a possibility that he may have issue inheritable to the same intail.

It is admitted, that if *Philip* has issue at any time, the issue may inherit; and then the estate must continue in *Philip*, because the law expects his having issue. Tenant in tail may suffer a recovery and bar his issue, because he has the whole inheritance in him. As to 2 *Roll. Abr.* 415. where a devise to a monk is held void, and the remainder good: in the same book, *pl.* 4. it is said, that if a lease be made to a man who is not capable (as a monk) for life, the remainder over is not good: so that in a devise, because the intent of the devisor is regarded, it is good; but not in a conveyance at common law. As to the case, *Cro. El.* 422. there the only question was, whether if the devisee in tail die in the life of the devisor, his heir in tail could inherit, and it was held that a subsequent limitation to take effect on the death of such a person without issue should take effect immediately, because there was no possibility for the issue to inherit. *Plow.* 557. *b.* 29 *Aff.* 61. Tenant in tail was bound in a statute merchant, and had issue; the issue was outlawed of felony, but pardoned in the life of the father; the father died, the issue entered, the conusee sued execution of the land, and the heir brought an assise; and it was held that the outlawry for felony so disabled him in his blood, that he could not take by descent the lands in tail, any more than lands in fee, notwithstanding the charter of pardon, which could not restore his blood to its former purity; and when the father died the land could not revert to the donor, because the donee had issue, though that issue was disabled, and upon the father's death the freehold was in no person, but *in nubibus*, and because every man in the world had an equal title, the land *conceditur occupanti*. *Bro. Descent*, *pl.* 23. As to 9 *Co.* 140. *a.* that there may be an estate-tail which may not descend to the issue; the reason is, because there is a total disability

ability by the fine of the baron, whereas the disability in the case at bar is only temporary, and is removed upon conformity. 4 *Leon.* 84. *Goulds.* 102. An alien born purchased lands in tail, remainder to a stranger in fee, and suffered a recovery; and it was held, that the remainder was barred, for before office found he was a good tenant to the *praecipe*, and that the alien had a good fee-simple; and though in this case it was impossible for him to have issue inheritable to the intail, yet the recovery barred the remainder. If there is in the eye of the law any person that by possibility may be inheritable to the tail, the reversioner shall never enter, till the first limitation is fully at end. Till 1705. *Joseph* the younger brother of *Charles* and *Philip* was alive, and a protestant; and it is not pretended that he could enter, though he was issue in tail; and then if the life of *Philip* prevented his entry, consequently it must prevent the entry of the reversioner. Though *Philip* was a recusant, yet no claim ever came to him, therefore no disability could come to him in respect of the lands, but only in respect of his person: if the reversioner should enter, there would be no remedy for the issue born after.

The disabilities are pardoned by 2 *W. & M. c.* 10. which is a general law, and therefore to be taken notice of by the court, though not found.

3. This act of 1 *Jac.* is altered by 3 *Jac.* which extends to all the offenses in 1 *Jac.* *Hob.* 73. seems to admit, that the punishment ought to be according to 3 *Jac.* for that he that enters on the land of the recusant is only tenant at will. 1 *Keb.* 263. The court was of opinion, that 3 *Jac.* meant no other cause but what 1 *Jac.* intended, to prevent the education, and that the King hath not an interest in the land of a recusant, as by 3 *Eliz. c.* 3. of fugitives, only a right to a perception of the profits, which by the return and conformity of the offender immediately vanishes.

4. The statute of 3 *Car.* has also made several alterations in 1 *Jac.* for it alters not only the disposition of the estate, but the forfeiture; for by this statute there must be a conviction, and then *Charles* not being convicted can forfeit nothing; and the opinion of *C. B.* was that this statute must be the rule. By this the King is to have the land, and by 3 *Jac.* the next of kin, which is inconsistent. It is not necessary to cite all the cases where it has been held, that a subsequent statute being contrary to, or inconsistent with, a former, is an implicit repeal of that former law. 11 *Co.* 61. 1 *Jones* 22. It is agreed, that 3 *Car.* extends to more offenses than 1 or 3 *Jac.* If it had extended to fewer, there might be some colour to say, that the other statutes are necessary; but if both

3 *Car.* and 1 *Jac.* inflicting different punishments for the same offense, should be in force; the consequence would be, that the offender would be punished twice for the same offense, contrary to the rule, *nemo bis puniri debet pro uno et eodem delicto*.

Though after the preamble of 3 *Car.* it is enacted, that 1 *Jac.* shall be put in execution; yet the intent of that could only be to continue 1 *Jac.* for the punishment of offenses committed between that and 3 *Car.* for without this those offenses would remain unpunished, 1 *Jac.* being implicitly repealed. If 1 *Jac.* continues, the punishment designed by 3 *Car.* though the heavier, will be avoided; for if 1 *Jac.* prevents any estate from vesting in the recusant, nothing can be forfeited by 3 *Car.* for he cannot forfeit what he has not, and he can have nothing by reason of 1 *Jac.* But if 3 *Car.* is a repeal of 1 *Jac.* (as I apprehend it plainly appears to be) it follows, that *Charles* being never convicted, had a good estate to make a tenant to the *praecipe*, and being himself tenant in tail under the settlement of the first Lord *Charles*, has by coming in as vouchee in a recovery barred the remainder to the right heirs of Lord *Charles*, under which the duchess claims. But if that recovery be not good, yet the life of *Philip* who may possibly conform, or leave issue capable, will stand in her way; so that taking it either way, the judgment given below for the defendants was well given, and ought to be affirmed.

Fortescue replied. 3 *Car.* can be no repeal of 1 *Jac.* for though the penalties are different, yet they are consistent. The difference between a forfeiture and a disability is, that a forfeiture can be applied only to what the offender has, but a disability cannot be forfeited. The books are full of cases, wherein it has been held, that a possibility cannot be forfeited, or a right. A disability is an incapacity in the offender to take any estate. *Nil dat quod non habet*. This case is like that of a monk, who on his deraignment may fetch back the estate wheresoever it is gone; and so may *Philip* on conformity, or his issue inheritable, enter upon the reversioner in the case at bar.

Parker C. J. This seems to be a matter of great difficulty: two different constructions of the act of Parliament have been set up, viz. for the plaintiff, That the disability is total in the recusant, and no right at all of the estate-tail shall vest in him, but it shall go over to the next issue in tail capable; if there be none, to the reversioner; because otherwise the recusant would be able to defeat the intent of the act, which was to preserve the estate to the heir or posterity. That for the defendant is, that the compleat legal estate shall vest in the ancestor, because otherwise they who must claim

claim through him could not take by descent, so that the intention of a benefit to the heir would be defeated that way.

Now both these, though they have a colour of being for the heir's benefit, yet tend to defeat it, and will not answer the intention. If the first should prevail, that nothing vested in *Charles* or *Philip*, but the estate passes over to the reversioner; then the estate-tail must be totally determined. Then if *Philip* should have issue capable (of which there is still a possibility) they will be barred, for if the estate-tail be once determined, nothing can set it up again. Indeed where a man takes an estate, and afterwards a more worthy heir comes *in esse*, who may take the same estate, it shall divest out of the former and vest in the latter: as if tenant in tail has two sons, and dies, the eldest enters and dies leaving his wife privement enseint with a son; the estate presently vests in the younger brother, but as soon as the posthumous son is born, he shall have it; but this is, because both come in under the same estate-tail, and there is no determination of it: but he in reversion can never enter, so long as any right of the tail which he has granted out remains.

The other construction, by making the compleat legal estate vest in the recusant ancestor, enables him to alien: so that though the act says the ancestor shall be disabled to take for and in respect of himself, and not for and in respect of his heirs or posterity; this construction enables him to take for his own benefit, contrary to the benefit of the heir. Consider therefore, whether there be not a middle way between these two, which may better answer the intention, (*viz.*) that the right of the tail shall vest in the ancestor, so far as is necessary to convey the descent to the issue, but not to enable him to alien: then indeed the defendants will have no title, but how can the lessor of the plaintiff enter in *Philip's* life-time?

The act of 3 *Jac.* seems to be quite out of the case, being made foran other purpose.

The act of 3 *Car.* does concern the same persons and crimes (amongst others) with that of 1 *Jac.* but it is not therefore a repeal of it. It is objected, that it inflicts inconsistent penalties; but why are they inconsistent, since one may have a proper operation upon some estates, and the other upon others?

I do not see what advantage can be taken of the act of general pardon; for though it is a publick act, yet he that will take the benefit of it must shew how he is intitled to it, and that he is not within any of the exceptions; so it should have been found.

Pratt

Pratt J. The clause which says, that all estates, terms, and other interests, made to such recusant, shall be void; does not indeed concern descents, but purchases: but consider whether an argument may not be drawn from thence, that the intent of the act was, that they should take no right, no interest at all.

Pas. 2 Geo. it was argued a second time by Serjeant *Hooper* for the plaintiff and Mr. *Lutwyche* for the defendant. ✓

Hooper Serjeant. The disability by 1 *Jac.* happened before any thing descended either to *Charles* or *Philip*: it might have descended to *Joseph*, but he being dead without issue, it reverts to the donor. The statute of 1 *Jac.* induces such a temporary disability, as prevents any thing from vesting. *Charles* and *Philip* were no lords, though the verdict calls them so; for the statute disables them to take any hereditament, as a dignity is. Second argument.

As to the point, whether this act be repealed or not, it seems strange to imagine, that an act made with such deliberation should in two years after be repealed; especially if we consider what happened within those two years; the powder plot was then just discovered, and immediately an act passed for a publick thanksgiving for that deliverance; the conspirators are attainted, and then at the same Parliament is this statute made, which is set up for a repeal of 1 *Jac.* the great bulwark against popery. These have different operations, and may well stand together; the one prevents estates from vesting, and the other meddles with estates vested.

But supposing for argument sake, that which otherwise I can never admit, that 3 *Jac.* does amount to a repeal of 1 *Jac.* yet surely then the statute of 3 *Car.* has revived it; for it enacts it to be put in due execution, which plainly shews it was not thought to be repealed by 3 *Jac.* or intended to be repealed by 3 *Car.* and it is to be put in execution as well against crimes *to be*, as those actually committed.

The common recovery can have no effect, being suffered by one who had no estate in him at the time, and therefore could not by deed inrolled make a tenant to the *praecipe*. By deed inrolled (that is, by bargain and sale) nothing passes but what may lawfully pass, for it does not work a disseisin or any *tort*. The act 1 *Jac.* is express, that such person shall be disabled to take: by the recovery he may extinguish his right, but he cannot alien it, he has *jus extinguendi*, but not *jus alienandi*. On 1 *Jac.* the crown can have no right, because nothing vests in the party; and therefore if the father

is seised of lands in fee, and the son is attainted of treason in the life of the father, and the father dies; the land shall escheat, for that the father died without heir, and the crown cannot have the land as a forfeiture, because the son never had it to forfeit. 1 Inst. 13. a. Here nothing is vested in *Charles* or *Philip*, and so consequently they can forfeit nothing. They have *scintilla juris* to preserve the estate-tail, but not to forfeit or destroy it. The crown can never take but by record, either judicial or ministerial, as in the case of an escheat the crown takes by office, which is a ministerial record.

I come now to the chief point, whether the duchess can enter, living *Philip*? At common law before the statute *de donis* all estates were fee-simple; and the statute was calculated more for the benefit of him in reversion, than the tenant in tail or his issue, for now the reversion is certain, and the donor may limit as many remainders as he pleases, which he could not do before, for there could not be one fee-simple depending upon another; and the reversion is now fixed, which before was but a possibility, for now the tenant in tail can neither bar nor clog the reversion, except by a recovery which is not mentioned in the statute *de donis*; since which there is no one statute that gives the tenant in tail power to charge the reversion. As to the case now before us, the statute of 1 Jac. has repealed the statute *de donis*, for by that *Charles* and *Philip* are made inheritable as issue in tail, but now by this latter statute they are disabled.

At common law before the statute *de donis* a *formedon in reverter* did lie on failure of issue; and in our case if there are no issue inheritable to the estate, it must revert to us, who are the right heirs of the donor. If tenant in tail dies leaving his wife *privement enfeint* with a son, the estate-tail must revert to the donor, subject to the entry of a posthumous son. (C. J. Have you any case to that?) *Hooper*, I did not look for any, thinking it constant experience.

This estate must go to the reversioner, otherwise where can it go? The act of 1 Jac. takes away and abrogates not only all rules and maxims of law, but also all acts of Parliament prior to it, that are contrary and repugnant. 8 Co. *Prince's* case. That was a settlement of part of the duchy of *Cornwal* by act of Parliament, there the estate (as it has lately done till King *George* came to the crown) when there was no Prince of *Wales*, lay dormant for many years; and when there was a Prince of *Wales*, rose again. In our case, if *Philip* should have a son, he might enter; but in the mean time the estate must go over to the reversioner. Some persons are capable to take by purchase, that are not capable to take by descent; but

no case proves that one may take by descent, that is disabled to take by purchase.

Lutwyche contra. As to the first point, whether any thing vests in *Charles* or *Philip*: if the statute had intended to induce a total disability, there would not have been the saving clause as to the heir; which implies, that the ancestor shall be capable to take for the benefit of the heir. The heir is not to be a purchaser, but the ancestor himself, and consequently it must vest in the ancestor, for otherwise it cannot descend to the heir; be the inheritance either fee-simple or fee-tail, the ancestor must inherit, to transmit it to posterity. If no estate vests, and it be an inheritance, where can the freehold be during the life of the offender? It cannot be in abeyance, and therefore the right of the intail shall vest in the recusant, but the crown shall have the profits.

Had this statute intended a total disability, it would have provided to whom the land should have descended in the mean time, as in 6 R. 2. c. 6. 11 H. 7. c. 20. and 4 & 5 P. & M. c. 8. On 6 R. 2. the heir is a purchaser, but on the 11 H. 7. he takes by descent. 3 Co. 37.

As to the *Prince's* case, that was by act of Parliament; and resolved that it would not be good at common law.

It is objected, that if the offender has the estate, he may destroy it, and bar the issue for whom the statute is so careful. To this I answer: That if by this statute the estate-tail vests in him, a common recovery is as incident to his estate, as alienation is to a tenant in fee-simple. My Lord *Coke*, 1 *Inst.* 223. b. enumerating the several incidents to such an estate says, That the tenant in tail may suffer a common recovery, and therefore, says he, If a gift in tail is made, with condition restrictive of such an incident, the condition is repugnant and void, for such a tenant has a right to turn the fee-tail into a fee-simple for the benefit of his heirs, by barring strangers. C. J. Can he make a deed for a tenant to the *praecipe* without an alienation? *Lutwyche*, Such an alienation only with intent to suffer a recovery, may not amount to such alienation as is prohibited within the intent of this statute. 4 *Leon.* 84. Land was given to an alien in tail, remainder to another in fee: the alien suffered a recovery, and died without issue; it was urged that the recovery was void, for that the alien was not tenant of the freehold at the time of the recovery suffered, but the whole court held, that the recovery was good to bar the remainder.

Another

Another question is, whether the reversion can be executed living *Philip*? 1 *Inst.* 28. a. is, that if lands be given to a man and his wife and to the heirs of their two bodies, and they live till each be 100 years old, yet do they continue tenants in tail, for the law fees no impossibility of their having issue. In our case, if *Philip* has any issue, he may inherit; but if the reversioner once enters, he must enjoy it for ever, and then what becomes of the saving clause as to the heir?

C. J. Is there any case which proves that the estate shall not be divested out of the reversioner?

✓ *Lutwyche*. I could not find any. The issue in tail cannot enter in the life of the offender, and *a fortiori* the reversioner shall not.

He insisted on 1 *Jac.* being repealed, and the disability pardoned, as in the former argument.

✓ *Parker C. J.* It has been insisted on for the defendant, that the clause in 1 *Jac.* as to the heir makes it necessary, that the legal estate should vest in the ancestor, in order that the heir may convey a title through him; but it is considerable, whether the effect of that clause be not rather, that whatever difficulty would regularly arise to the heir from the ancestor's not being seised, *that* shall not be any objection to the heir in this case. Not that the ancestor shall be seised for his sake, but his want of seisin shall not prejudice the heir. The heir shall take the same advantage, as if the ancestor had been seised.

It is contended that the disabled person shall take by purchase in respect of his heir; but that is a notion I cannot understand, how he that cannot take for himself, can take by purchase in respect of his heir. The words *in respect of himself and not in respect of his heir* must be applied, *secundum subjectam materiam*, i. e. as the subject matter of the clause will bear. The disabled person is made incapable to take a personal estate by the same clause, but it is plain that other intervening clause cannot be applied to that, and so it seems to be in the case of purchases. No authority has been cited of either side, and it seems a very considerable question, whether in the case of tenant in tail with a remainder over, the remainder being once vested in default of issue in tail, can be divested by reason of issue after born. Suppose the case of a fee-simple, the land escheats for want of heirs; shall it divest out of the lord, and vest in a posthumous heir?

The

The statute of 3 Jac. is entirely out of the case. 3 Car. inflicts a penalty of another kind, viz. a forfeiture of the estate vested: but if 1 Jac. be taken to be entirely repealed, then 3 Car. will not provide for all the cases that may happen; as if lands descend after the disability attached. Therefore the most natural construction seems to be, that the first clause of 3 Car. which enacts that 1 Jac. shall be put in execution, leaves 1 Jac. its full force and effect, as to all cases not afterwards provided for by 3 Car.

The difficulty as to the Duchess's taking during the life of Philip seems the most considerable; for suppose the other part of it as to the divesting the estate out of the remainder-man were out of the case, how can she enter, while there is any issue in tail in being? Suppose there had been a disseisin, and she was to bring a *formedon*; must not she lay it, that all the issue male of the body of Thomas are dead?

It is said that *issue* must be *issue inheritable*, which Philip is not; but he may inherit upon conformity, and issue inheritable *sub modo*, *sub conditione*, is still issue inheritable.

Pratt Justice. That objection indeed has the greatest weight; for as to the clause, *for and in respect of*, &c. that can have no other construction, but that the ancestor shall be disabled, but that disability shall not hurt the heir.

Disability may be either total or temporary. *Total*, such as that of an alien, would have prejudiced the heir. This is a temporary one, and therefore though the saving for the heir had been left out, I should have thought it must have had the same construction, as it will now have; and regularly the disability should not have prejudiced the heir in all cases. But such temporary disabilities may in some cases by intendment be prejudicial to the heir, as in case lands in tail descend after the disability attached, and no issue in tail is then *in esse*, they must go over in that case. And so it seems to me it will be now, notwithstanding the addition of that clause; if there be an heir in tail capable of taking at the time of the descent, that he shall have the land; but if not, he will be prejudiced by that accident, and it must go over: at least till some person comes *in esse* capable of taking the estate-tail, the remainder-man shall enter, for the freehold cannot be in abeyance.

Hilary 3 Geo. it was argued a third time by Mr. Reeve for the plaintiff, and Serjeant Ckeshyre for the defendant. Third argument. ✓

✓ Mr. Reeve. The title of the Dukes depends on three acts of Parliament, 1 and 3 Jac. and 3 Car. which were all made to prevent the growth of popery. And he argued, she had a good title under 1 Jac. which remains unrepealed, either by 3 Jac. or 3 Car.

1. It is not repealed by 3 Jac. These two statutes relate to different persons and different offenses. 1 Jac. relates to all persons, 3 Jac. only to children. In 1 Jac. the offense is passing or being sent beyond the seas to be there educated; in 3 Jac. the offense is going without licence. The penalty in 3 Jac. is less than in 1 Jac. 3 Jac. is only the profits, in 1 Jac. the estate itself is forfeited, and the reason is, because the offense against 1 Jac. is greater than that against 3 Jac.

2. The statute 3 Car. is no repeal of 1 Jac. The rule indeed is, *Leges posteriores leges priores contrarias abrogant*, but those two statutes may consist together. Though both extend to the same persons, yet the penalties are different and consistent. 1 Jac. works a disability to take after the offence committed, 3 Car. a loss of what the offender had before the offence. If it should be construed, that 3 Car. is a repeal, then papists will be bettered by that statute, for they will be restored to their capacity of purchasing, which was taken from them by 1 Jac. neither can they be convicted upon 3 Car. if they will but be content to stay abroad: no process can reach them there, for they can only be outlawed in the case of high treason. 26 H. 8. c. 13. 5 Ed. 6. c. 11. 3 Inst. 32.

The statute therefore of 1 Jac. being in force, and the measure between us, I come in the next place to consider whether any and what estate vests in the offender. If the statute had intended he should take by descent, it would not have disabled him to purchase for the benefit of the heir. In the case of a purchaser the lands must vest in the ancestor, or else the heir cannot take. The offender is disabled in respect of himself only, and not in respect of his heir: whereas if it should be construed, that he may take by purchase or descent, it will then be in his power to bar the heir. If he takes any right, it must be for his own benefit, and not barely *jus alienandi*. And when it is said that admitting he does take, yet he has no advantage, because he forfeits the profits; that may be avoided as I said before, it being in his power to prevent a conviction on 3 Car. by his keeping beyond sea, and then the whole profits notwithstanding the statute may be applied towards the support of popish seminaries.

If it be said, that by construction of law the crown shall have the profits during the disability of the offender; I answer, that if the offender cannot take the estate, the crown cannot have the profits. 1 *Inst.* 13. a. If the crown were to take the profits, it would be only a pernancy of them, as in outlawry in a personal action; and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation. 21 *H.* 7. 12. *Raym.* 17. *Hardr.* 101. *Salk.* 395, 408. 5 *Mod.* 109. Whereas if it be construed, that the offender is disabled to take, he will be consequently disabled to alien, and then the act will have its full force.

It will not be improper under this head to consider some of the disabilities at common law, and compare them with the present case. 1. *Propter delictum*, as by attain. 2. *Propter defectum subjectionis*, as an alien. 3. Profession in religion.

1. The first of these works a forfeiture of the estate to the King for treason, and to the lord for felony; it corrupts the blood; the crown shall have the purchase of such a person upon office found; and this disability differs from that created by 1 *Jac.* 1. Because that created by 1 *Jac.* is temporary. 2. Personal, and works no corruption of blood. 3. Because an offender against 1 *Jac.* has no capacity to purchase, which one attainted has for the benefit of the crown.

2. An alien has no inheritable blood in him: he can have no heir, nor be heir to any man: he has a capacity to purchase, but not to hold; for upon office found the King shall have it. And this disability differs from that under 1 *Jac.* because on the one hand the issue of an offender may inherit, which the issue of an alien cannot, and on the other hand an alien may purchase, which our offender cannot.

3. The next disability is that of a monk, or one entered into religion: that comes the nearest to the present case. For, 1. The purchase of a monk is void, so is that of the offender. 2. Neither of them can inherit. 3. Their heir is not disabled. 4. In both cases the disability is temporary, for the monk is restored upon his deraignment, and so is the offender upon his conformity. It is true, in 1 *Inst.* 2. b. a monk is called *civiliter mortuus*, but that is only a similitudinary expression: that he is not a dead person is proved by his being restored upon his deraignment, he may be abbot, executor, bring and join in actions. 1 *Inst.* 132. b. The disability therefore of a monk comes very near the present case; and it is no foreign supposition

position, to intend the Parliament designed to bring the offender under the same incapacity, as a monk, who transgressed no statute, was under at common law. And the rule of construction is always to be guided by the reason and practice in parallel cases. 3 Co. 85. b.

The principal difficulties started in this case are two. 1. Whether the Duchess can enter in her remainder during the life of *Philip*, who is issue in tail though disabled. 2. In case she may, whether upon *Philip*'s conformity or leaving issue inheritable, the estate can divest out of her, and *Philip* or his issue enter.

1. As to the first: Supposing then *Charles*, *William* and *Philip* disabled to take this estate: since *Charles* and *William* are dead without issue, *Philip* is now the only person who, as heir male of the body of *Thomas* first Lord *Gerard*, is next in remainder by virtue of the settlement, and the disability as to him being before the estate devolved upon him, it must go over to the next in remainder, who is the lessor of the plaintiff. The law will never cast a descent upon one that is attainted, though he may hold what he acquires by his own act, till office found. 1 Ven. 417. 1 Inst. 13. a. *Fitzb. Mortdancestor*, 47, 55. The second son recovered, because the first was beyond sea. *Carter* 198. 3 Co. 10. b. 3 Cro. 28. 9 H. 6. 24. b. 3 Co. 61. b. Grandfather tenant in tail, father attainted, grandfather dies, the issue of the father may enter. The Duchess does not claim by descent from the disabled person, but by virtue of the remainder limited to the right heirs of Lord *Charles*, upon this presumption, that the former remainders are all extinct, *Philip* still continuing under the same legal incapacity.

2. But the greatest objection is, that the statute having provided, that the land which descends to such an offender shall not escheat, neither shall the issue be hurt; if the estate was to go over to the reversioner, the issue of *Philip*, or he himself conforming, cannot take, for the estate is gone.

Answer. The statute says, the offender upon his conformity shall be restored to his capacity as before, but doth not say he shall be restored to what he forfeited by the disability.

But admitting he is designed to be restored to all upon his conformity, then I insist he may call for the estate, and so may his issue, though it be gone over. It is a maxim in law, that a freehold cannot be in abeyance. 1 Inst. 342. b. It cannot be in *Philip*, by reason of the disability, nor in the crown, *Philip* never having been in possession, and there being no provision in the statute for that

that purpose: nor in the Lord, for the whole estate is not spent; and therefore it must be cast upon the reversioner, the law being careful that the freehold shall never be in abeyance. 5 Co. 52. b. Bro. Escheat 33. Prerog. 947. 1 Inst. 2. b. Philip therefore being disabled, the next in remainder, who is the lessor, must enter to preserve the estate.

Plow. 486. b. is; That after an attainder of treason, and till office found, the freehold shall be in the person attainted so long as he lives, and he shall be tenant to every *praecipe*; but when he dies the land cannot descend to the heir, for his blood is corrupted; and it cannot be in the King till office found, and therefore till then it shall escheat to the Lord, as upon the death of his tenant without heir; though part of that case be denied for law in 3 Co. 10. b. for there it is said, that by the common law for lands in fee-simple, and by 23 H. 8. c. 13. for lands in tail, the actual possession was not in the King till office, but when tenant in fee-simple is attainted and dies, the fee and freehold without any office are thrown upon the King (though not held immediately of him) to prevent an abeyance, and the land shall not escheat to the lord till office, for in all cases the escheat for high treason is to the King. But if tenant in tail is attainted and dies, it shall not vest in the King before office; for neither the attainder nor the statute work any corruption of blood as to the descent of lands intailed; but now the statute 32 H. 8. transfers and vests the actual possession in the King by the attainder, as well in the life as after the death of the person attainted, and as well of lands in tail, as of lands in fee. So it is if an alien dies, the freehold is presently in the King, without office. 5 Co. 52. 8 Co. 76. Plow. 229.

The issue may very well take after the death of Philip, for though the Lord has entered by escheat, yet a person claiming paramount to him may enter and oust the Lord. 3 Inst. 231. 49 E. 3. 16. 8 Co. 76. b. Fitz. Mortd. 46. 2 Inst. 183. H. P. C. 322. The issue in tail shall never be hurt by the disability of the tenant in tail; Philip by his own act shall not hurt the issue, be the estate gone over to the reversioner, or Lord by escheat: and that was the design of the saving.

A reversion must take effect at the instant the particular estate is determined. If the eldest son dies seised leaving his wife *priveement enseint* with a son, and the second son enters (as he must) and afterwards a posthumous son is born, he shall enter upon his uncle, and so shall a posthumous issue upon the Lord by escheat. F. N. B. 195.

It has been objected, that the duchess cannot make out her title in a *formedon in reverter*. But why not? she need only set out her pedigree, and allege the death of the donee in tail without issue; and that would bring it to the question, whether dying without issue capable of taking is not in law dying without issue. 8 Co. 88.

The recoveries suffered by *Charles* are of no effect, for if he was disabled to take the estate, he could not make a tenant to the *praecipe*, and then the recoveries are void.

The statute therefore of 1 *Jac.* being in force; no estate vesting in a person disabled, and no recovery by him suffered being good; since *Philip* by reason of the disability cannot take, but upon his conformity may be let in, or leaving issue capable, that issue may take notwithstanding the estate is gone over: to prevent an abeyance the lessor of the plaintiff shall take, and so had a good title to make the lease.

✓ *Cheshyre* Serjeant *contra*. The question is whether the remainder limited to the heirs male of the body of *Thomas* be extinct, so as the subsequent remainder to the right heirs of Lord *Charles* shall take place. If the first remainder be not extinct, the title is with the defendants by reason of their possession.

Under 1 *Jac.* we say, the disability does not prevent the vesting of the estate, but relates only to a pernancy of the profits, which will better answer the end of the statute in encouraging conformity than losing the whole estate without a possibility of being restored: his conformity is in the nature of a condition precedent, which if he performs he ought to reap the benefit of it. On the one hand it will be an encouragement to the offender to be restored to a pernancy of the profits, whereas on the other hand if he should not be restored, he will have no encouragement to conform.

The effect of the recoveries is out of the case, for *Philip* claims paramount to them, and it would be hard his issue should see the estate go over, and be put to a difficulty to convey a descent to himself, and get back the land from him in remainder. There is no law which restrains papists from selling their estates; on the contrary it ought to be encouraged, for by that the protestant land interest is strengthened.

The crown shall have the profits during the disability of the offender, for the profits of the land are forfeited to all purposes of benefit

benefit, as much as if the land itself were forfeited. By a grant of the profits the land passes. 3 Lev. 289. 1 Inst. 4. b.

The government sought not the estates of the offenders, but their conformity. If a minor under the guardianship of his uncle, who is his next heir, be sent abroad by him; if it should be construed that the estate is gone, then the uncle who was the greatest offender would reap the benefit (a). Whereas if the land vests and the profits only are forfeited, it will be as great hindrance to childrens going beyond sea, and no encouragement to the guardians to send them, and then too there will be no abeyance. (a) Sed N. B. 3 Car. reaches him too.

The reason why the punishment under 3 Car. is less than 1 Jac. (for he put 3 Jac. out of the case) is, because 1 Jac. was made upon a pinch, and when the bent of the nation was against the papists, and when that occasion was served, it was thought proper to mitigate the penalties.

This disability cannot amount to a refusal, so as to make the estate go over, for the offender could not bar his issue by matter *en pais*. The divesting and revesting estates is not favoured in law. 1 Co. 87. 22 E. 3. 19. Hob. 336, 346. Fitz. Dower 143. Maynard 161. If the estate should be sent over, it can never be brought back again, and then the provision in benefit of the heir would be to no purpose.

At common law profession in religion was equivalent to death: it was a civil death, and a *formedon* would lie, *eo quod suscepit super se habitum religionis, in quo habitu professus fuit*. 1 Inst. 133. F. N. B. 196. And a writ of *Mortdauncestor* would lie upon such a suggestion.

I admit the posthumous issue in tail may enter upon the reversioner, for he only takes *pro hac vice* to prevent an abeyance, of which there is no danger in the case at bar, if our construction prevails.

He insisted likewise on the matter of the pardon, and the life of Philip.

The court said nothing, taking this to be the last argument: and so it stood two terms upon a *curia advisare vult*. But then understanding, other counsel had been retained to argue, if occasion; they desired to hear them. And Trin. 4 Geo. (Parker C. J. being made Lord Chancellor, and Fortescue come down into the King's Bench)

Bench) it was argued a fourth time by Sir *Thomas Powys* for the plaintiff, and Sir *Edward Northey* for the defendant.

V Fourth argument.

Sir *Thomas Powys*. In order to make a title in the plaintiff upon this record, I shall endeavour to prove, that Lord *Charles* being educated in a foreign popish seminary, and continuing a papist to the time of his death, was by the statute of 1 *Jac.* 1. c. 4. disabled and made incapable to inherit any legal estate, and consequently the recoveries suffered by him are void, and ineffectual to bar the remainder under which we claim; and that *Philip* continuing under the same disability, the estate-tail is spent, and the duchess must enter as in her reversion.

For this purpose I shall consider these three things. 1. What will be the consequence upon the statute of 1 *Jac.* taking it singly and by itself. 2. What alterations have been made by any subsequent statutes. And 3. What influence the common recoveries and the life of *Philip* will have in prejudice of the Duchess's title.

1. Then, to take 1 *Jac.* by itself, and consider it in relation to this case. Upon this statute it is that we must make our stand, for I must admit that the common recoveries, and the life of *Philip*, will be objections against us, unless we can have the assistance of this statute to remove them. And as this is to be our foundation, it will be proper to observe the time and occasion of making it.

It is very well known, that during Queen *Elizabeth's* reign the papists were very active in finding out means to ruin the protestant religion, or in the language of those times, to fight the pope's battles. Amongst other expedients that were thought of, and put in execution, this of erecting popish seminaries in foreign parts for the education of the *English* youth was one of the principal contrivances of the papists, to bring about their design, and therefore the government at that time was very vigilant to prevent the ill consequences of it. And to that purpose a law was made 27 *Eliz.* c. 2. which being very doubtful and obscure in many respects, and thought by some to be but a temporary act, which expired by that Queen's death, it had not the intended effect.

Immediately upon King *James's* accession to the throne the statute we are now upon was made, as an effectual provision against so great a mischief. And as the mischief was great, so the Parliament thought there was no time to be lost in putting a stop to it, and therefore one of the first things they set themselves about as soon as they came together, was to apply a proper remedy to this mischief.

This

This early care of theirs will be sufficient to silence any insinuations, as if this was but a trifling and an insignificant attempt, and not designed by the Parliament to bring the papists under those difficulties, which it is objected will be the consequence if our construction prevails: in answer to which they of the other side set up a construction, which tends only to make this (as they call it) a still-born statute. I need not mention the rule laid down in *Hob.* 87, 93, 97. that an act of Parliament shall never be construed to be void, if it can possibly be otherwise; but shall be expounded in such a manner, that it may as far as possible attain its end.

The statute has a twofold operation. 1. To create an incapacity to take any estate, under the words, *be disabled and made incapable to inherit, purchase, take.* 2. To prevent the enjoying any estate vested before the offense, implied in these words *have or enjoy.*

The whole clause runs, “ That every such person so passing or “ being sent, &c. shall, as in respect of him or herself only, and “ not to or in respect of any of his heirs or posterity, be disabled “ and made incapable to inherit, purchase, take, have or enjoy any “ manors, lands, &c.” And then follows the proviso for conformity.

It is the first part of those words creating the disability *to take*, which is what we rely upon, for the offense was committed by *Charles* and *Philip* before the descent of the estate to either of them; so that what might be the construction of the statute as to estates *vested* will not need to be now considered, being intirely foreign to the present question.

The words *be disabled to inherit, purchase, take*, are very strong and significant, and without doubt would have been sufficient to have hindered any estate from vesting in the disabled person, if the statute had not gone on, and made provision for the benefit of the heir. The word *inherit* would have prevented any descent to the offender, and the word *take* would have stopped him from claiming as a purchaser. The words in Lord *Delaware's* case are not so strong, and yet the dignity was held to be suspended, and he no baron, but only an esquire. The statute of 11 & 12 *W. 3. c. 4.* is penned in the very same expressions, and upon that it has been held, that no estate would pass to a papist by any conveyance whatsoever. The words of 31 *Eliz.* against simony have been construed to create such a disability, as that the presentee cannot bring an ejectment, or sue for tithes; and yet the words there are not heaped up so elaborately as in our statute.

But it is contended, that the words, *in respect of himself only and not in respect of his heir*, do restrain and qualify the others, and shew the estate was designed to vest in the ancestor, in order to enable the heir to take.

To this I answer, That they are not to be considered as words restraining the former: if it be any, it must be but a partial restriction, as to lands, tenements and hereditaments only, and not to leases, goods or chattels, which the heir has nothing to do with; and it is absurd to say they shall qualify as to part, and not throughout. This saving the right of the heir, enures only as an exception of the heir, and leaves the statute to run *in non exceptis*, for the exception helps to prove the rule, and shew that the offender himself was designed to be left under the utmost force of the former words.

The offender himself was the person principally aimed at; the care of the heir was but a secondary intention, and therefore the first is not to be overthrown to make way for the second. But say they, what use then will you make of this saving? were the words added with no view or design at all? I answer, They were put in only *in majorem cautelam*, to satisfy every body, that only a personal disability was intended: they were not added as necessary, but to prevent any doubts which might arise in prejudice of the heir, and as my Lord Coke says, To satisfy ignorant men, and also to clear any suspicion, as if the Parliament intended to resemble this case to that of an attainder, and so cut off the communication between the ancestor and heir. If the other side will have us find out some use or other for these words, what can it be, but only to enable the heir to make out his title through one who was never seised?

But surely it is no consequence, that because the disability is not to run upon the heir, therefore the estate must vest in the disabled ancestor. This would be intirely to overthrow the statute, for then, contrary to the words, he will *inherit and take*. And if he be allowed to inherit and take, they must at the same time give him a power to alien, and by this means he will be enabled to prevent any discovery of his offense, for none but the next heir will take that advantage, and if he does, the other knows how to revenge himself.

In order to overthrow our construction, and yet leave the act to have some effect, it has been insisted for the defendants, that the statute only creates a disability to take the profits.

To this I answer; that there are no words in the statute which look that way; it is perfectly silent as to any such thing; and can it be imagined, that if the legislature had intended so, they would not have adapted the words to such an intention? Can any one think they would throw in clauses out of abundant caution in one place, and yet be intirely silent in so material a point as this? The statute disables them from taking or enjoying goods and chattels in the same clause which relates to lands; now nobody can have the profit of goods and chattels, but he who has the property, and the offender cannot have the property by reason of the statute; so that construing the profits only to be forfeited can go but to part, and it is absurd to create distinct disabilities as to the real and personal estate, when the statute has coupled both together, and made no distinction between them.

The statute says the offender *shall not take*. The defendants by their construction say he *shall take*, and so they give the statute an operation as to a pernancy of the profits, a matter in which it is silent, and this is to overthrow the plain sense of the words, which disable him from taking the estate.

And as it is pretty extraordinary to think the statute designed only that the pernancy of the profits should be forfeited; so it is much more extraordinary, that if they had such a design, they should take no care to dispose of them elsewhere, or name the person they intended should have them during the disability. The same Parliament were so far from thinking *that* a matter proper to be left undetermined; that when by the statute of 3 Jac. they disabled an offender against that statute from enjoying any estate, they immediately directed the next protestant of kin to take the profits: if they had any such design in our statute, they would have expressed it in the same manner; but they very well knew, they had no occasion to direct the application of the profits, when they had before disposed of the whole estate.

They endeavour to supply the want of a direction to whom the profits are to go, by telling us, that by construction of law the crown shall have the profits, because this is a publick offense, and not to the detriment of any particular person, according to the case of *Woodward v. Fox*, 2 Vent. 187, 267.

If this was to be allowed, I know no use the statute would be of; the profits could only be forfeited as in outlawry in a personal action, and it would be in the power of the offender to deprive the King of the pernancy of the profits by his alienation; not to mention

tion the prejudice that would accrue to the heir; whereas if it be construed, that the offender is disabled to take, he will be consequently disabled to alien, and then, and not till then, the act will have its full force.

But whilst we are arguing to preserve the estate for the heir, against the alienation of the ancestor, we are told, that we are endeavouring to defeat one great end and design of the statute which was to strengthen the protestant landed interest; for say they, give us the estate that we may alien it to a protestant, and that will be a means to work us out of the kingdom. To this, I must observe, that it is a little unlikely, they who are so solicitous to get the estate, will be so willing to part with it. To what purpose should they argue themselves into the estate, if they can so readily leave it as soon as they have it? They can never be in earnest when they tell us, they only desire the estate to have an opportunity to shew the world how generously they can relinquish it. They who argue in this manner, must distinguish between a purchase and a descent; for when they contend for lands by descent, in order to hand them over to a protestant; they can never mean, to secure to themselves a power to alien to one of their own religion: that would be to make him a purchaser against the express words of the statute, and would also overthrow that plausible pretence of theirs, of strengthening the protestant landed interest; for if they may alien at all, they must have a general power, and then it can hardly be supposed they will turn their backs on their own religion, in order to propagate heresy, and root out themselves.

If the gentlemen who argue in this manner are really in earnest to advance the protestant interest, I can shew them a way how it may be done more effectually than that they are now in; it is only by keeping the estate from ever vesting in a papist, and giving it away to the next person capable of taking it. This is a plainer and easier way to bring about what they pretend to have so much at heart; for if the protestant interest be best advanced by working papists out of their estates, then I am sure that end will be easier effected by keeping them out intirely, than by letting them in upon a bare promise, how specious soever, of surrendering their estates when required.

When any great mischief is intended to be remedied, such a construction must be made as will tend the most effectually to prevent the mischief. The mischief is, that children go beyond the seas for a popish education. Now, if our construction prevails, the offender will be in a manner cut off from his own family and his native country: he will be in many respects as an alien, exile,
or

or one professed; and the bringing all these disabilities upon him will be a means to deter him from going, and then the end of the statute is answered. In making this construction we go along with the words and reason of the statute, but they on the other side in their exposition leave both behind them, and under pretence of finding out a plain, easy operation for the statute, they set up an imaginary construction of their own, which I have before shewn tends only to overthrow it.

But this milder construction of the disability and sinking it below the words ought not to prevail for these reasons. 1. Because it is contrary to the rules laid down in expounding statutes made for the advancement of religion, for *summa est ratio quae pro religione facit*. Such statutes, says my Lord Hobart in *Colt v. Glover's case*, are to be extended even beyond the words. And so is 11 Co. 70. *Magdalen College case*, where there are many instances of this nature. There words, short and imperfect in themselves, were carried beyond the letter to attain their end, but we are told in this case, though the words are full and express, yet the sense is to be softened and mitigated. 2. Because it is contrary to the rule of exposition of statutes made to prevent any great mischief in the commonwealth, or which enact any thing to its benefit. In 11 Co. 34. *a.* it is said, that such statutes, though penal, shall be taken by intendment, and he instances even in criminal cases.

This case comes under both these rules: the mischief designed to be prevented by the statute strikes both at our Religion and Civil Government, to have our youth educated in seminaries of jesuits, where they acquire the greatest inveteracy against both.

The rule of the civil law is, *in dubio legis intentio non verba valent*, but no rule can be shewn, that where words are plain, and express, an intention shall be presumed contrary to the words. I believe, if a common person was to read this statute, he would not be able to raise any doubts upon it, though lawyers we see have.

When we have drove them out of all their holds, then they resort to the saving in the statute as their last refuge; and argue, that because the estate is saved to the heir, therefore it shall vest in the disabled ancestor. But surely this would be a very strange exposition, to draw such an inference from the saving words of a statute, as will overturn and destroy the very purview itself. And thus they who are so solicitous to set up the saving for the benefit of the heir, are all the while doing him the greatest mischief; for if the ancestor has the estate, he must have it with a power to alien, and this will enable him to keep all under him in subjection; for if the protestant

heir goes to take the advantage, he will sell; if he be a remainder-man, he will suffer a common recovery, and revenge himself that way. There is no need in constructions upon such statutes to give the estate to the ancestor, for in Lord *Delaware's* case the peerage never vested in *William*, and as the book takes notice, he was but an esquire, and yet the dignity descended to *Thomas*.

They ask us, If the estate is not in the offender, where is it? To this I answer, that certainly it is not in the disabled person, if it can go any where else; for that would be *maledicta constructio quae corrumpit textum*. In *Hob.* 87. it is said, that an act of Parliament may indeed be void, but not if by any possibility it can be otherwise; and that whatever is a necessary consequence of a statute, is as much a part of it, as if it had been contained in the body of it. *Hob.* 293. It may make a felony, and *Bro. Corone*, it may operate as a pardon by intendment.

Again: Where an act of Parliament has made any new point, the Judges are to construe it so as to make it practicable, though it thwarts some of the maxims of the common law; for that is the main business of all acts of Parliament, to correct the common law; and if a statute be inconsistent with the common law, and both cannot stand together, then the rules of law must give place to the statute, and not the statute to them.

I must admit it to be a good rule in expounding statutes, to go as near the common law as we can, provided we do not set up the latter to destroy the former, but blend them one with another as long as they will hold together, and when they grow inconsistent, then the common law is to be rejected.

To see then where the estate is, let us first consider where it is not. It is not in the offender, by reason of the statute, as I have before shewn; and if not in him, then there can be no pernancy of the profits in the crown; for 1 *Inst.* 13. a. where the son was attainted, living the father, it was held, the King could not claim by escheat, because the son never had any thing. It cannot go to the heir of the offender during his ancestor's life, for *nemo est haeres viventis*, and therefore since it cannot go any where else, it must return to us, who are the reversioner, as to the first mover. Thus estates are supposed to have first moved from the lord, and therefore when the tenant dies without heir, it goes back to the lord by way of escheat. So of estates-tail; if nobody be capable to take them up, the donor must enter as in his reversion.

To

To this they object the proviso in the statute, for conformity; and ask us how they shall have back their estate again, in case they should conform.

This admits of two answers: 1. It does not appear that this proviso has any retrospect, or words of restoration in it: it only makes him from thenceforth capable of taking an estate, but does not provide that he shall be as if he was never under any disability. He loses what should have vested during his recusancy as a punishment for it, and his conformity is as a condition precedent to his taking any future estate. When he has lived as a recusant all his life, it is not reasonable, that a feint conformity at the last should put him in the same condition with those who have been always innocent. 2. But admitting that the offender is designed to be restored to all upon his conformity, then I insist that he may call for that estate which passed by him during his disability, for the same act which incapacitates him to take, may put him *in statu quo* on its own terms. One act may attain a man, and another restore him upon condition; and why may not the same statute do as much? There is no more difficulty in shifting the estate from the reversioner to the conformist, than in the *Prince's* case from him to the crown, and so back again when there is a new Prince of *Wales*, which desultory kind of inheritance has been held good. In the Earl of *Derby's* case in *Raymond*, it is laid down, that where estates are limited by a statute for particular purposes, they are not to be measured by the rules of law, else says the book, how could the *Prince's* case be law, but that the Judges were obliged to go according to the act.

Thus according to *Beaumont's* case, 9 *Co.* and *Hob.* 257. estates-tail may cease and rise again. It is one of the maxims of the common law, that a freehold cannot be in abeyance, but yet we know in cases of necessity, the contrary is every day's experience: as where a parson dies, the freehold is in abeyance. *Litt.* § 646, 647. So where houses are annexed to offices: and the like of estates-tail. *Litt.* § 649, 650, 613. 1 *Inst.* 331. a. 345. a. So there may be a movable fee-simple both as to persons and as to place. A man may be passed over as a person not *in esse*, as a monk who is *civiliter mortuus*, who may notwithstanding upon his deraignment enter upon the reversioner. 2 *Roll. Abr.* 150. B.

Suppose tenant in tail dies, leaving his wife *privement enseint* with a son; this shall not hinder the reversioner, but that he may enter till the birth, and at the birth the tail shall revive; for the expectation and presumption that there may be a child shall not keep
I the

the freehold in abeyance. 7 Co. 8. b. And from hence we may argue *a fortiori*, that any expectation of conformity shall not keep us out, since that is more unlikely than the birth of a child *en ventre sa mere*. I shall leave this first point with inculcating that the incapacity in our case is *to take*, and not barely *to enjoy*.

2. It being thus established that the act of 1 Jac. has created an incapacity to take: the next thing to be considered is, whether any subsequent statutes have altered the law in this point, and taken off the disability.

It is not contended on the other side, that there ever was any express repeal of this statute; but the most they pretend to is, that it being inconsistent with the subsequent statutes, it is implicitly repealed, according to the rule, *leges posteriores leges priores contrarias abrogant*.

Before I enter upon the consideration of the consistency or inconsistency of the three statutes, I would observe, that repeals by implication are to be used very tenderly, because they infer a very high reflection upon the law-makers, as if heedlessly and unknowingly they made contrary and inconsistent laws. 11 Co. 63. 1 Roll. Rep. 91.

It was given up in C. B. and agreed to in this court, that 3 Jac. relates to different persons and different offenses from 1 Jac. and therefore I shall pass it by and take no notice of it.

The statute of 3 Car. is that which is set up by the other side to be the governing act, and an implicit repeal of 1 Jac. notwithstanding it enacts it to be put in due execution, which is sufficient to shew it was not intended as a repeal.

It was said upon a former argument, that 1 Jac. was made upon a pinch, and when the bent of the nation was against the papists, and it being very severe upon them, 3 Car. was made to mitigate those penalties. In order to answer this pretence I must resume the historical part of the case, and consider the circumstances of the nation at the time of making this latter statute. During Queen Elizabeth's and King James's reigns the people were very jealous of the designs of the papists, and therefore we see endeavoured by several acts of Parliament to fence against them: upon King Charles's accession to the throne their suspicions were rather increased than diminished; that Prince was then newly married to a daughter of France, a Roman catholick, and several favours were at that time shewn to the papists: this occasioned great disquietude
and

and uneasiness to those of the protestant reformed religion, which afterwards broke out into an open rebellion, and ended in the murder of that Prince, and the banishment of his son. It is well known, that the Parliament which enacted this law was far from being acceptable to the court, and therefore it was suffered to continue but a short time, and then followed the long intermission of Parliaments: as this Parliament was not in the interest of the court, so they were highly incensed against the papists, who they began to fear were likely to gain ground, and therefore they set themselves at work to attack them in that which was their weakest place, namely in taking away the estates vested *before* the offense, as to which the former statute was doubtful; so that now they were able to meet with them both ways: by 1 *Jac.* they prevented the *vesting*, and by 3 *Car.* the *keeping* any estate after the offense. Now if it should be construed, that the measure of all these disabilities must be by 3 *Car.* then that Parliament, instead of distressing the papists as was intended, has rendered their condition more easy; for on 3 *Car.* a conviction is requisite, to avoid which they may keep abroad, and have the profits of their estates transmitted to them, for they will be out of the reach of any process necessarily previous to a conviction.

But the main end and design of this latter statute (which has not yet been mentioned) was to lay a heavier punishment upon the person *sent*, who before forfeited 100 *l.* only, and the child *sent*, who was the most innocent, bore all the resentment of the statute; whereas both are now put upon the level, and some new disabilities are created, as from being executor, &c. and it also extends to private schools, which the others did not.

3. I come now to consider what influence the common recoveries and the life of *Philip* will have in prejudice of the Duchess's title.

Now as to this point, what I set out with will principally govern it, for if the second *Charles* never had the estate in him (as upon my former reasoning I apprehend he never had) then the recoveries will be void, and suffered by a person out of possession; as if the issue in tail should suffer a recovery in the life-time of his father: a fine indeed he may, but that is by the express provision of the statute 32 *H. 8. c. 36.*

As to the life of *Philip*, my objections against the estate's being in abeyance, and the way I have shewn how he, or his issue, may be restored upon conformity, will be sufficient to remove that obstacle.

But to come closer. Say they, whilst there is issue the reversioner cannot enter. I deny that in this case. *Issue* must be heir of the body, *Hob.* 346. *Dy.* 332. *a.* *Plow.* 560. and he must be issue inheritable, which *Philip* is not: he, as I have before shewn, is disabled, and cannot call for the estate; according to *1 Ven.* 417. he is to be considered in consanguinity, but not as heir. And if he cannot take, then his issue cannot, (admitting him to have issue, which is not found, neither is it so in fact, so that the argument is only from a possibility of his having issue) for it is not enough that he is issue, unless he be heir of the body to claim the intail, and heir of the body he cannot be in the life of *Philip*, for *nemo est haeres viventis*. My Lord Coke, *1 Inst.* 377. *a.* puts the case of tenant in tail to him and the heirs male of his body, he has issue a daughter, who has issue a son; the grandson, says he, shall not keep out the reversioner, though he be heir of the body, because he does not derive his descent through males. It is said of an exile, *quod perdidit patriam*, and it will sound as well to say of *Philip* *quod perdidit patrimonium*.

We are not obliged to wait for the possibility of his conforming. Shall an estate stand suspended, because it is possible an alien may be naturalized, or a monk be deraigned? Even in the case of an infant *en ventre sa mere*, which is stronger, the estate goes over till the birth. *Cro. El.* 422. *1 Inst.* 391. *29 Aff. pl.* 61. *Plowden* 557. indeed says, there might be an occupant in that case cited out of the book of *Affise*, but that was only said *arguendo*, and is contrary to *Yel.* 9. *2 Roll. Abr.* 151, 152. for he must claim by a *que estate*. If an advowson be granted to *A.* for the life of *B.* and *A.* dies before a vacancy, the grantor shall present, and there shall be no occupant.

The next thing relied upon by the defendants is the act of general pardon, *2 W. & M. st.* 1. *c.* 10. which, say they, has cured all. This has been sufficiently answered by those who have argued before me, as there are exceptions in it, and it is not found, the court will not take notice of it. *H. P. C.* 252. *Cro. El.* 125. *1 Keb.* 20. *1 Lev.* 26, 76. *Bro. Charter de Pardon* 46. *Pleading* 124. *8 E.* 4. 7. *4 H.* 7. 8. *b.* The general words might pardon the offense, but would not restore the forfeitures without special words. *1 Lev.* 120. *1 Saund.* 362. If simony be pardoned, yet that does not operate so as to restore the offender to the living. *5 Mod.* 15.

The last thing they object to us is, that *Charles* was in possession all his life, and therefore the recoveries are good: but was this any other possession than that of a wrong doer? A monk might be

a disseisor, but yet it will not be pretended he had any legal estate in him; no, he was at best but an occupant, and in this case *Charles* was no more; he had it is true a *pernancy* of the profits, but that is all; he had not such a possession and freehold as enabled him to bar the remainder by coming in as vouchee in a recovery. I desire to know, whether it will be pretended, that if a papist since the 11 & 12 W. 3. c. 4. should get into possession, and receive the profits of any estate, whether I say he can be deemed to be in legal actual possession? Certainly he cannot: he cannot take advantage of his own wrong, and no more shall the tortious entry of *Charles* (for such it was) enure to his benefit; and turn to the prejudice of us, who are in reversion.

There is one thing more which they press upon us, and that is, that we can shew no instance where this act has been put in execution in the manner we are contending for, or indeed in any other manner. I may retort the argument upon them, and demand to know, if they can produce any case which seems to look their way, or so much as countenance the construction they have set up: the truth is, the matter is still at large, and no argument can be drawn by either side from the disuse of the statute. Many statutes there are in full force, upon which there are no footsteps for many years. And as to this particular statute, I can give them a very good reason why it was never yet drawn in question; they of the same religion will never take advantage of it, and these are the people who mostly have it in their power, though in our case indeed the reversioner is a protestant: besides, it is very difficult to prove a foreign education, and a being sent with intent, for the jesuits though they were caught in this case, will never be caught again; none but a man of Duke *Hamilton's* application and interest could have brought them over; but now they know the consequence, they will never be prevailed with to give the same testimony, and as this is the first case upon the statute, so in all probability it will be the last.

Sir *Edward Northey contra*. I shall not need to go about to prove a title in the defendants upon this record, for their possession is sufficient against the plaintiff, who must recover upon his own strength.

The plaintiff relies on 1 *Jac.* only, but in my argument I shall pin them all together, and admit them to be consistent; for my Lord *Coke* says, where there are several statutes relating to the same matter, one must not be singled out from the rest, but the construction must be uniform upon them all. The three statutes now in question were all made with the same view, and to prevent the same mischief, and that was to be brought about by laying heavy punishments upon the offenders, and thereby obliging them to conform.

There

There are two sorts of offenders; those who send, and they who are sent, which latter we say forfeit only the profits of their estates, and that was taken to be the consequence of the statute at the time of making it, and therefore 3 *Jac.* does not introduce any new law when it speaks of the profits, but only directs the application of them to the next protestant of kin, which under 1 *Jac.* the King as *pater patriae* was intitled to.

The plaintiff does not make his case on 1 *Jac.* which respects only the intent, but has brought it within the words of 3 *Car.* for it is found they were actually educated, which is carrying the intent into execution.

I shall put every thing out of the case, but the operation of the statute as to descents. I would fain know, if this was an estate in fee descended, who should have it? The heir according to their maxim cannot, and shall it escheat to the Lord, as if the whole estate was spent? Can it be thought the legislature intended to favour the Lord or reversioner before the innocent issue? He must be prejudiced, unless it be construed, that the profits only are forfeited. The construction must be, that the ancestor shall take the legal estate, but he shall take no benefit by it: he shall not take for the advantage of himself, but for the benefit of his posterity he shall.

The statute 11 & 12 *W.* 3. has the words *be disabled to inherit or take*, but yet in the case of *Pye v. George* 1 *July* 1709. in *Canc'* it was held, that the subsequent words had controlled the former, so that they carried away no more than a *pernancy* of the profits, and the legal estate descended notwithstanding.

A man may take only for the benefit of another, as a person attainted, for the benefit of the crown. 1 *Inst.* 2. *b.* 2 *Roll. Abr.* 88.

I put all the rules of law out of the case, and come to the proviso for conformity: and I take it, that upon conformity the offender is to be *in statu quo*; and if so, how can the estate be revested? There is no provision for it in the statute, and that is an argument it was never intended the estate should go over. My Lord *Delaware's* case, cited of the other side, is a case which has room enough to hold us both. It says that *Thomas* shall claim *from William*, and not *through him*. Now the word *from* implies he was seised, for otherwise *Thomas* could not claim from him. Here the estate-tail is not spent, and therefore the reversioner cannot be let in.

It is objected, that the freehold shall not be in abeyance. I answer, it is not; it is in the offender.

It is said, *Philip* has no issue, and the reversioner must not be obliged to wait upon that contingency. Answer: We must provide for what may be, as well as what is; the law never sees any impossibility of having issue, and therefore upon a general intail there can be no tenant in tail *apres possibility*. Here is a possibility that *Philip* may have issue, and therefore the estate must continue to serve that possibility whenever it arises.

Another objection is, that if we have the estate, we may alien it. I answer: The statute never intended to put the heir out of the power of the ancestor, but only that he should not be hurt by the disability of the ancestor.

We do not now rely on the recoveries, but set up the life of *Philip* against the plaintiff. I agree, if tenant in tail leaves issue an alien, the remainder-man may enter, for such issue is as none.

If therefore the estate vests, and the profits only are forfeited during the disability, then the lessor of the plaintiff can have no title.

Sir *Thomas Powys* replied. In Lord *Delaware's* case it is said the peerage never was in *William*, he was only an esquire, and this destroys the inference from the word *from*. As to the case of *Woodward v. Fox*, it is a case *primae impressionis*, and a long while after this statute, so that the law-makers could not know, the profits would go to the crown of course, it not being a point settled till that case. I know nobody to whom the estate would have gone, had this been a descent in fee, but to the lord by escheat; and it is no new doctrine to divest estates escheated, as on birth of a posthumous heir, or reversal of an attainder. 3 *Inst.* 231. And the same may be done on *Philip's* conformity.

Curia advisare vult. And Trinity 6 Geo. the court delivered their opinions *seriatim*, beginning with the puisne Judge.

Mr. Justice *Fortescue*. In delivering my opinion in this case, I shall make three points, which I design to speak to distinctly. Resolutio
curiae.

1. What estate vested in the second *Charles*, who suffered the recovery, upon the statute of 1 *Jac.* 1. c. 4. independent of the subsequent statute. 2. What alteration was made in that law by the 3 *Car.* 1. c. 2. and how the construction will be on both those sta-

tutes taking them together. 3. What will be the effect of *Philip's* life, who upon this record must be taken to be alive.

1. The reformation, which was begun in *Henry* the eighth's time, and compleated in the reign of *Queen Elizabeth*, had rendered it difficult for the papists to educate their youth at home as they designed, and therefore it was the advice of the pope at that time, to erect colleges abroad, that the *English* youth might be sent thither. And pursuant to this advice, in the year 1598 there were two set up, one at *Rome* and the other at *Doway*, by which means many of our youth were drawn out of the kingdom, to the no small prejudice thereof; and in order to put a stop to this mischief, the statute of 1 *Jac.* 1. c. 4. was made, which though it be a penal law, yet it ought to have a liberal construction, because it so much concerns the publick welfare of the kingdom: all laws are in some measure penal, but that is no reason to restrain them in such cases as this. 11 *Co.* 34, 70. *Hatt. of Stat.* 66. *Hob. Cest v. Glover.*

And upon this act I am of opinion, that a person who receives a foreign education in a popish seminary, has neither *jus in re* nor *ad rem*: he can take no estate at all, either real or personal; he is disabled to inherit, purchase, take, have or enjoy: and can any words be stronger than these?

But it is said the word *enjoy* implies a vesting of the estate, and that only a forfeiture of the profits was designed. Now if the word *enjoy* should be so taken, I do not see how it could affect this case; for that could only relate to lands vested before the offense (which is a case that seldom happens to infants, and therefore cannot be supposed to have been uppermost in the mind of the legislature) but as to lands that are to descend after the disability, there are other words to take in that case, which are *inherit*, *purchase*, *take*. Besides, 1. It is a very rare phrase to express a forfeiture by words of disability only: in the statute of 3 *Car.* there are words of forfeiture. 2. In a penal law it is too severe to construe words of a present temporary disability, into an absolute forfeiture; but if they should, they will only relate to goods and chattels. 3. And it is plainly a disability in 1 *Jac.* If we do but compare the proviso of that with the proviso in 3 *Car.* which induces a forfeiture. In 1 *Jac.* he is disabled to take, and therefore the proviso for conformity restores him to a capacity of taking. In 3 *Car.* he forfeits; and there the proviso restores him to the land, which shews the Parliament were aware of the difference between a disability to take, and a forfeiture of the estate. 4. If only the profits should be said to be gone, what is that but the land itself. *Co. Litt.* 23. by a grant of the profits the land passes.

But it is objected, that he must take for the benefit of the heir, being only disabled in respect of himself, and not in respect of his heir. To this I answer: That these affirmative words always imply a negative, and separate the case of the ancestor and heir: he himself in his own person shall not take, but his heir shall, *i. e.* this disability shall not be like an attainder, which corrupts the blood; but it shall still flow pure from the ancestor to the heir.

In these cases there is no need to leave any thing in the ancestor, according to Lord *Delaware's* case, which is express, that the dignity never vested in the grandfather, he was no baron, but only an esquire. And there the Lords and Judges were of opinion, that the heir might claim by him, this being only a personal temporary disability, which differed from an attainder.

Then the objection recurs, Are these words of no use at all? It often happens so, that to satisfy the scruples of the ignorant, words are added, which the more knowing part of mankind will plainly see were implied before: they are only explicatory of what went before, and serve to shew, that the heir in this case shall be enabled to make out his title through one who was never seised.

But say they, How can the heir take by descent according to the rules of law, if the ancestor was never seised? To this I answer, 1. That at common law it is not necessary the ancestor should be seised, to enable the heir to take by descent. *Shelley's* case is, that where the ancestor *might* have taken the estate and been seised, there the heir shall inherit. Nay in some cases the heir shall take by descent, although the ancestor never was or could be seised of that estate, as in *Co. Litt.* 378. where lands were given to *A.* and *B.* for their joint lives, remainder to the right heirs of him that died first, *A.* dies, his heir shall take by descent: and yet the remainder never vested during the life of *A.* it being uncertain all that time, whether the heir of *A.* or the heir of *B.* should have it. 2. Whatever it might be at common law will not avail in this case, which is an incapacity by act of Parliament; and therefore the common law is a wrong *medium* to judge by. There could be no such desultory inheritance at common law as *The Prince's* case, and yet it was there allowed, being by act of Parliament. And though these points are singularities, and contrary to the known rules of law, yet they being introduced by statute, must not be carried to the rules of law as to their standard.

And now let us consider a little the inconveniencies of a contrary construction. It will be an encouragement to the papists to continue
in

in that religion, when the punishment is not so great as what I contend for. It will be a discouragement to the heir or remainder-man from putting the act in execution, because he will then be cut off for his pains. It destroys the saving for the benefit of the heir, by putting it in the power of the ancestor to disinherit him. It is a repealing of the former part of the statute by implication only, which is never to be allowed; because it is a reflection on the wisdom of the legislature. 11 Co. 63. Hob. 15, 87. It is against all the rules of construction, to take them in the mildest sense, where Religion and the Publick are concerned. Hob. 344, 388. 11 Co. Magdalen College case.

The offender may deprive the King of the *pernancy* of the profits by his alienation. 21 Hen. 7. 12. Raym. 17. Hardr. 101. 5 Mod. and Salk. Britton v. Cole. In the other act of 3 Jac. 1. c. 5. the very profits are mentioned to be forfeited, of which there was no occasion here, when the land itself is gone.

It is objected that he may be convicted, and then 3 Car. carries all to the crown. But can he be convicted if he stays abroad? It is said it goes to the crown by implication, because this is a publick crime. For this there is no necessity in the case of a disability, as there is upon a forfeiture, which implies a having, and then it is to be carried away, whereas in the other he never has it at all. The person is the subject of one, and the land of the other. How can he forfeit what he has not? *Nil dat quod in se non habet*. Besides, a disability reaches what cannot be forfeited, and this difference between a disability and a forfeiture is kept up in many statutes.

2. The next thing to be considered is, whether any alteration is made in 1 Jac. by the statute of 3 Car. which, I take it, may very well stand with all the provisions of 1 Jac. and has not impaired the force of it in the least. 1. It enacts it to be put in due execution. 2. It reaches the offender more fully as to estates vested before the offence, about which the former statute was doubtful. 3. It lays the same penalty on the parent or guardian sending the youth abroad, who before forfeited 100 l. only. 4. It extends to private schools, whereas the other was confined to publick colleges. 5. It creates a disability to sue, be executor or administrator or committee of any ward; and after all these additions, are we to be told, it was only explanatory of the former law? Can a forfeiture be the measure of a disability? It is said to have so far enlarged and enforced the former law, as to shew how that must be put in execution, *viz.* by conviction. Now does it not say 1 Jac. *shall be put in due execution*? And does not that imply, that of itself it is sufficient, and *may be put in execution*?

The

The case of a fee-simple is put as a difficult case to know where the estate is to go. But are cases plain and express to be broke in upon, because difficult cases may be put? In the case of a purchase say they, if the bargaineer cannot take, who can? But was it not expressly resolved in *Roper's* case, that a bargain and sale would be absolutely void. There is no reason why a statute must be expounded away to nothing, because one or two difficult cases may be put upon it. The construction I lay down, and which in my opinion it ought to receive, puts the act in some use. The construction I have been arguing against leaves it no force at all.

3. The life of *Philip* is objected to be an impediment, which prevents the execution of the reversion in the lessor of the plaintiff, for say they, whilst he lives, the estate-tail continues. But I give the objection this answer: that *Philip* can take nothing, no more than *Charles* did. It is to this purpose the same thing, whether he be incapacitated or not *in esse*: the rule of law is, that where any limitation is to a person not *in esse* at the time the estate ought to vest, the estate must go over to the next in remainder. Here the limitation is to *Philip* and the heirs male of his body, but when that limitation ought to take effect, he is incapacitated to take, and then the remainder over to the lessor must take effect immediately. *Cro. El.* 422. Devise to *R.* in tail, and after his decease without issue to *Edward* in tail; *R.* dies leaving issue, living the testator; and there it was held, that *Edward* should have the estate presently, and not wait till the death of *R.*'s issue. If a man has issue two sons, and the eldest be an alien, the law takes no notice of him, and therefore as he shall not take by descent himself, so he shall not impede the descent to his younger brother, on supposition that he may have issue a natural born subject. Indeed in the case of a person attainted, he shall obstruct the descent. 2 *Ven. Collingwood v. Pace*, but his heir cannot take, for that would be to let him in by act of law, and the law will not trust him with an estate. And in such cases, where the law will not suffer the estate to fall, it goes over to the next person capable of taking. 1 *Ven.* 417.

It is said the limitation is to the issue of the body of *Thomas*, and *Philip* is such. It is true he is so in common parlance, but that is not enough; he must be issue inheritable, and for want of that here is a cesser of the estate-tail, on which the reversioner must enter. *Hob.* 346. *Dy.* 332. He is in the same case with the son of a daughter on a limitation to the heirs male of the body, for there the son is heir, and he is a male, but not a male inheritable within the form of the gift, because he does not derive his descent through males. 1 *Inst.* 337. a.

It is objected that here is still a possibility, that *Philip* may have issue inheritable. But this is but a possibility, and for a possibility it was never yet known that the freehold was allowed to continue in abeyance, for the law abhors abeyances, and will never suffer them, but in cases of absolute necessity. In all cases where the heir is incapacitated to take, the ancestor may justly be said to die without heir. *Co. Lit.* 13. a. The lessor might in this case lay it in a *formedon*, that *Thomas* is dead without any heir male of his body. 8 *Co.* 88. This is no more than the common case of a posthumous heir, where the reversioner enters till the birth, and then the tail revives.

It is said *Philip* may conform, and to serve this possibility the estate must continue. Why may not an alien be naturalized, or a monk be deraigned? and yet was there ever any estate suspended on that occasion? If the King's tenant dies without heir, to prevent an abeyance the law casts the freehold on the King without office: and to prevent the like mischief it will carry the estate to the reversioner in this case.

This case of a foreign education very much resembles the case of a monk, for 1. The purchase of both is void. 2. Neither can inherit. 3. The heir of neither is disabled. And 4. The disability is but temporary in both cases. And it is no answer to say that a monk is looked on in law to be civilly dead, for that is only a similitudinary expression, and as he loses no civil rights, but is considered in many respects as a member of the community, so he is answerable for any offenses by him committed after his civil death. *Bro. Moin.* 23, 25. Our offender is more civilly dead than a monk; for the latter may be executor, but the former cannot. An outlaw, one under a *praemunire*, or abjuration, are as much civilly dead as he: and why is not this temporary disability like the case of a parson who married and was formerly on that account incapable to hold his living: or like the case in 2 *Roll. Abr.* 415. C. 6. of a devise to a monk for life, remainder over to *B.* who was allowed to take immediately: and suppose that had been a devise in tail, should the issue of the monk have taken? certainly he should not.

Another difficulty laid in the way is the proviso for conformity, because say they we cannot easily get back the estate again. But is not the objection as strong upon their construction in bringing back the estate from the crown? Is it easier to recover against the crown than a subject? Besides it is far from being clear to me, that this proviso does restore him to his estate; there are no such words in it, but only that he shall be restored to his capacity, that is, he shall

shall for the future be capable of taking any estate that may come to him. If the meaning of that proviso was to restore him to all; I can see no difficulty, but that he may as easily bring back the estate again, as in the case of a posthumous heir, or a monk deraigned. 3 *Inst.* 231. *Fitzh. Mord.* 46. *F. N. B.* 195. *Dy.* 13. The Lord by escheat takes but *in loco haeredis*, as the reversioner here does in the room of *Philip*. 9 *H.* 6. 23. *b.* 2 *Roll. Abr.* 418. His incapacity shall no more keep back the estate from the reversioner, than in the case of a devise for life or in tail, to one who refuses, remainder over, it shall vest immediately.

Upon the whole therefore I am of opinion, that in this case the statute of 1 *Jac.* is the measure by which we are to construe this disability, and that under this statute no estate ever vested in *Charles*; by which he having no possession, the recovery is void; and that the life of *Philip* will not stand in the way of the *Duchess*: as a consequence of all which the judgment given below for the defendants is erroneous, and ought to be reversed, and that this court ought to give a new judgment for the plaintiff.

Mr. J. *Eyre*. I must own I have the misfortune to differ from my brother, for I think the judgment given below for the defendants was well given, and ought to be affirmed; though I must say thus much, that I do not approve of the reasons given by the court of *C. B.* for that judgment.

The general question in this case is, whether a foreign education in a popish seminary infers an absolute disability to take any estate, for unless it does the lessor can have no title.

There have been three statutes mentioned in the debate of this case; the 1 *Jac.* 1. c. 4. 3 *Jac.* 1. c. 5. and 3 *Car.* 1. c. 2. Of these I think 3 *Jac.* is nothing to the purpose, but that of 3 *Car.* is of weight; not that I esteem it a repeal of 1 *Jac.* but I look on it as explanatory of it, and without which the former statute cannot be put in execution.

Now upon the statute of 1 *Jac.* (taking the first and last part together, as we must do to make a reasonable construction) I am of opinion that the party so educated has notwithstanding a capacity to inherit and take, for particular purposes, and that the statute does not induce an absolute disability, and that the construction will be the same in the case of a fee-simple as of a fee-tail. I do not say he is to be master of the estate, but thus much he must have, a power to transmit the inheritance to the heir. This is as to the case of a descent. In the case of a purchase too I think he has a qualified capacity,

capacity, for he may purchase for the benefit of the heir, as one attainted does for the benefit of the crown; and in both cases, that of a descent, and that of a purchase, the estate will vest, and the profits only be forfeited during the disability.

And it is no objection to say, that the statute is silent as to the profits where they are to go, for I take it such a provision was not necessary, since this being a publick offence, they will of course enure to the benefit of the crown.

Roper's case is of no consequence, for that was upon the 11 & 12 W. 3. c. 4. which is penned in a different manner from our statute: neither is Lord *Delaware's* case at all to the purpose, for there the disability was absolute for life.

But here it is objected that the offender for and in respect of himself is absolutely disabled, so that he was to be punished as much as possible, only the heir was not to be involved in the guilt. To which I answer, That the true end of the statute was, not to punish the persons of those who received this foreign education, but it was to prevent the influence they would otherwise have, if the estate should be continued for their benefit. And it is no objection to say, that the offender may defeat the crown of the profits by his alienation, for is not this the same with many other cases of forfeitures? and what reason is there to take more care of the crown in this case than any other? or what greater danger is there in having a capacity to take a future estate, than in being allowed to hold a present one, which I do not perceive it is contended will be absolutely taken from him by this statute. The heir it is true cannot enter living the ancestor. But this rather proves the necessity of leaving something in the ancestor, till the heir is capable of taking. And surely if it had been designed, that the estate should go over, it would have been so mentioned, as is done in 6 R. 2. about ravishers of women, where there are express words to carry over the estate. But no case can be shewn, where without express words any estate was carried over from a person who has a possibility of being inheritable. The case of a monk is widely different, for that was always looked on as an absolute death to these purposes, and a deraignment was never so much as looked for or expected.

Upon the whole my opinion is, that *Charles* had a sufficient possession and power to suffer a recovery, and this makes an end of the plaintiff's title, be that matter about the life of *Philip* which way it will; though if it were necessary to give my opinion upon that,

that, I should think the estate could not go over, but must continue for the benefit of him and his issue.

Mr. J. Powys. In a case of so uncommon a nature as this, and of such great difficulty, I think there is no occasion to make any apology for a difference in opinion from any of my brothers.

I shall make four points in this case: 1. Whether under 1 *Jac.* any, and what estate vested in *Charles* or *Philip*. 2. What alteration has been made by the subsequent statute. 3. What is the effect of the recoveries. And 4. Of *Philip's* life.

1. Then, to discharge this case of that which was the ground of the judgment in *C. B.* I can see no colour in the least to think, that 1 *Jac.* is any way repealed by the subsequent statutes. The intent of it, it is true, was to prevent the growth of popery, and in this respect it is a law made for the benefit of the publick; and though a foreign popish education is not to be favoured amongst protestants, yet I can never give into any forced construction, which is to carry the words to the utmost severity of the law.

The disabling clause in this statute is different from the 11 & 12 *W.* 3. which is absolute, but this *sub modo* only, in respect of himself, and not in respect of his heir; and therefore he must certainly have something: how else can he purchase in respect of his heir? I agree my brother *Fortescue's* difference between a disability and a forfeiture thus far, where the disability is absolute, but not where it is only partial, as in this case, which likewise distinguishes it from Lord *Delaware's* case, for that was a total disability for his life.

I think that upon conformity he will not only be discharged of the disability, but likewise be restored to his estate, for the end of the statute is answered, when it has been a means to draw him from the popish religion.

I do not say he is to have any benefit of the estate during the disability: no, the profits shall be forfeited, but only to support the estate for the heir, he shall be taken to have the legal title in him, and I can see no difference where the disability is at common law, and where it is created by act of Parliament. What a confusion would it otherwise create in the case of a fee-simple, or a purchase? In the case of a fee-simple is there any colour to say the Lord by escheat shall have it? he can claim only, when the tenant dies without heir; but here both the tenant and his heir are alive, and to prevent the entry of the Lord the statute takes care of the heir. It cannot be pretended, that a disabled person who may remove

that incapacity whenever he pleases, is a person dead without heir. I need not urge the inconvenience in vesting and re-vesting estates, which was never favoured as yet.

It is objected that the laying this inconvenience in the way, is begging the question; for say they, here will be no re-vesting, since the conformity will not restore him to the land. But does not the statute 3 *Car.* say expressly, he shall be restored to the land? And is not this to be taken as a declaration of what was not sufficiently expressed in the former law? Is not their conformity for the benefit of the publick? and is it not fitting, they should have some encouragement to conform? It is said they will have a future capacity to take any new estate that may come, but that is a rare case for children to meet with any besides their paternal estate.

The case of a monk, so much relied on as a similar case, is nothing to the purpose; for he is dead in law, and has an heir, but our offender can have none whilst he lives. And there too the heir claims under the seisin of the monk, which the heir in our case upon the plaintiff's construction cannot, for they say the ancestor had no seisin at all. Neither is the case of an infant *en ventre sa mere* at all applicable to this case, for there the person who enters till the birth is undoubtedly heir, and claims as such from him that last died seised, but here there is no such intermediate time as between the death of the father and the birth of the child, for the party who is to take is alive all the while, and *in esse* at the instant of the descent.

There is no danger of the freehold's being in abeyance, because as I take it the legal estate vests in the offender. I would put the case that a man has two sons by two *venters*, the eldest of which receives a foreign education, and survives the father and dies, must the brother of the half blood inherit to him? The law says no: but yet upon the plaintiff's construction he must, if the eldest son never had any thing, for then the other will claim immediately from the father.

There are many instances where absolute words in a statute have received a qualified construction. The statute of *Westm.* 2. says the fine *ipso jure sit nullus*, and yet 2 *Inst.* 336. it is held to be a discontinuance, for which before the 11 *H.* 7. the party was put to his *formedon*.

But when the argument that the profits only are forfeited prevails, there arises a sub-point, who shall have the profits? I say the King shall have them. 1. Because he is concerned to see the law

exe-

executed. 2. There are goods in the case as well as lands, and who can have them but the King? 3. This is an offense of a publick nature, *contra coronam et dignitatem suas*, and that makes the difference between the case of *Woodward v. Fox*, and the case of tithes, where a private interest is concerned. 4. Those will be like derelict lands which go to the crown when there can be no owner found.

2. I come in the second place to consider what alterations are made in 1 Jac. by the statute of 3 Car.

One great end and view of this statute is said to be, to reach estates vested before the offense, but there can be nothing in that, the former statute taking in both cases, for the words *have* and *enjoy* go to estates vested, and it is absurd to think the Parliament would trust them with a present estate, who were unfit to take a future one, which is suffering them to fight in armour. The true and main design of this latter statute was to lay a heavier punishment on the parent or guardian sending the youth abroad.

The statute 3 Geo. protects protestant purchasers of popish estates, and without doubt if *Charles* had sold this estate the purchaser would have been secure against that statute.

3. The effect of the common recoveries need not now be considered, because having the estate in him, as I hold he had, that is sufficient to exclude the reversioner.

4. *Philip*, who claims before the Dukes, is still alive and keeps up the estate-tail; so the reversioner is too soon: he is issue in tail, and a *formedon* must lay that there is none. In the case of *Pye v. Gorge*, 1 July 1709. before Lord Cowper, on the 11 & 12 W. 3. c. 4. which has the same disabling words, it was held that notwithstanding a default in not taking the oaths, yet the estate would vest in the party.

I think upon the whole, the lessor of the plaintiff has no title, and consequently the judgment of *C. B.* ought to be affirmed.

Lord Chief Justice *Pratt*. This case depends upon the construction of the statute of 1 Jac. 1. c. 4. And as the offence strikes both at our Civil and Religious establishment, this is in every respect *causa religionis et reipublicae*; and being so, if it be capable of two constructions, we ought to put that upon it, which will tend the most effectually to prevent the mischief.

It

It is notorious that the reformation, which was begun in *Henry* the eighth's time, was, by the unwearied diligence of the priests and jesuits, very much broke in upon and interrupted, so that it cannot be said to have been compleat till the reign of *Queen Elizabeth*, who had many and great struggles with the papists. The first attempt to restrain them within due bounds was by very gentle and easy methods, but it was soon found that these signified nothing; private meetings were had all over the kingdom, to instruct and confirm people in the principles of their religion; and therefore it was found necessary, by a severer law, to make it high treason for any one to reconcile another to the see of *Rome*: but even a little experience of this law shewed it to be an unequal remedy, and therefore the next step was to banish the priests, and now every body hoped the work was done.

But the priests, though by this law they were many of them obliged to leave the kingdom, were nevertheless still as active, in finding out means to ruin the protestant religion; and for that purpose erected seminaries abroad for the education of the *English* youth; and to put a stop to this mischief, the statute we are now upon was made, which if we do not construe it in a large sense, will dwindle into no remedy, and then all is at sea again.

The clause on which the question arises is this, speaking of a foreign education, it enacts, "That every such person so passing or being sent beyond the seas to any such intent, shall, as in respect of him or herself only, and not to or in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have or enjoy any manors, &c."

Now on the plaintiff's side they say, the statute induces an absolute disability to take the estate. The defendants say the estate vests, and nothing is forfeited but the perception of profits. The different consequences of these constructions are obvious. The first overthrows the recovery, and the life of *Philip*, and bears down all before it. The other opposes both to the plaintiff's title, and vindicates the method of cutting off the reversion.

And upon this clause I am of opinion, that the latter construction is not proper, nor will at all answer the end of the statute.

1. It is against the words, by making him capable, who the act says shall be disabled.

2. By

2. By this all the significant words of the statute are rejected, for there will be no need of the words *inherit*, *purchase*, *take*, because the word *enjoy* alone will do the business of the profits: and it is inconsistent with the honour and wisdom of the legislature to make use of such known legal expressions, when at the same time they are to have no influence in the construction of the statute.

3. When the profits only are designed to be forfeited, the Parliament speak out, as in the 3 *Jac.* 1. c. 5. in relation to offenders against that law: and there likewise they take care to dispose of the profits during the disability, which provisions are not in our law; and therefore it is not to be imagined, that the same thing was intended in both. And surely if at the time of making the act of 3 *Jac.* it had been designed to punish the offender against 1 *Jac.* in the same manner, there would have been some declaration or other to that purpose.

4. The forfeiture of the profits is idle, and comes to nothing; for if the estate vests, the party may alien, suffer a recovery, give it away, or settle it in other hands secretly for his own benefit, and then the provision of the statute will be ineffectual. And how can it be imagined, the Parliament would apply so loose a remedy to a growing mischief they were so much alarmed at?

It is objected, that this is a qualified disability. As to that, I think it was truly said, that the latter words import a negative, it is but *expressio eorum quae tacite insunt*; the import of which is only, that whatever difficulty could regularly arise to the heir from the ancestor's not being seised, that shall be no objection to the heir, who shall be able to make out his title through one that was never seised.

Consider the method of debating in Parliament. Somebody might object, that possibly it would be taken to the prejudice of the heir, by saying the ancestor should be disabled; to which it might be answered, that though it was not necessary to declare the contrary, yet for the satisfaction of ignorant men there could be no harm in putting in something to that purpose.

Lord *Delaware's* case is strong in point, for if that absolute disability would not prevent the descent, there is no colour to say this qualified disability shall.

But say they, if he himself is absolutely disabled to purchase, what will become of the heir? As to that, I think the Parliament

designed he should not purchase at all, for it follows after, that all estates, terms, &c. for the benefit of such a person shall be void: and are not these to be taken into the construction of the statute? Shall we reject all this, and say it signifies nothing?

Well, but here is a disability to take personal estate as well as real, and what has the heir to do with that? why nothing at all, and those words were only thrown in *ex abundanti*, for a disability to take personal estate as to himself, is as strong as to take it likewise against the heir.

The heir will not be hurt in this case, because according to *Shelley's* case it is sufficient if the ancestor *might* have been seized.

And as to the objection about the difficulty of being restored on conformity, I think there is none at all; because I hold, that he is not to be restored. The statute does not say so, and therefore I do not see how we are warranted to give him his estate again. No one will conform till he suffers, nor then neither unless he sees he is like to suffer further. But cannot the Parliament restore him by sufficient words? Surely they have power to vary the law, according to the *Prince's* case, which reduces this part of the case to this dilemma. Either he was, or was not designed to be restored. If he was, it may easily be done by force of the statute: if he was not, then the objection of difficulty in doing it is vanished.

It is objected that the remainder man cannot enter, living *Philip*, who is issue in tail. But I take it, a disabled person is to be looked on as not *in esse*; the current of authorities is so, and none to the contrary, but that if the party cannot take, the estate must go over. If the eldest son dies leaving his wife *privement enseint* with a son, the second son enters, but on the birth of the other the estate is brought back: and so does the remainder man or reversioner where the issue in tail is not born at the death of the tenant in tail. In the case of a fee-simple it shall escheat, and be divested out of the Lord on the birth of a posthumous heir. If it was the case of a purchase it would go over, and could never be brought back, as on a limitation to the heir of a person living at the determination of the particular estate, for he who takes by purchase must be *in esse* at the time the estate ought to vest. But it is otherwise in the case of a descent, for there he does not claim any new estate, but the old one, which his ancestor enjoyed before him.

Suppose a man has two sons, the eldest an alien and the other a denizen; in that case the estate shall go to the youngest, because the other is disabled, and so is the case of *Collingwood v. Pace*. In the

the case of an attainder it shall escheat for the disability. *Co. Litt.* 13. And in the case of profession it goes over as on a natural death. *2 Roll. Abr.* 150, 415. And the true reason of carrying over the estate in all these cases is, to prevent the freehold's being in abeyance, which is a reason why in the present case the reversioner must enter, else there can be no good tenant to the *praecipe*, which the law requires of every estate.

It is said that the law suffers abeyances in some cases, as in that of a parson, or where houses or lands are annexed to offices; but are not those cases of absolute necessity?

I can see no reason why in this case the estate cannot be brought back as easily as in the instances I have before put.

My brother *Fortescue* has so fully pressed that matter about the statute of 1 *Jac.* being in force, and unimpeached by 3 *Car.* that I shall not need to go over it again: nor do I find my brothers who are of a contrary opinion rely much upon that.

To conclude therefore, I am of opinion, that under 1 *Jac.* the offender takes nothing; which construction obviates the recovery, and the life of *Philip*, and removes every thing that stands in the way of the Duchess: and the judgment below being against her, I conceive it is erroneous, and ought to be reversed.

But the court being divided, you are now to consider what is further to be done in this cause.

Whereupon the counsel for the defendant in error proposed that it might be adjourned into the Exchequer Chamber for the opinion of all the Judges; which was opposed by the counsel for the plaintiff, who said that there were no instances where upon a division in that court, to which the cause was adjourned by writ of error, there have been ever any adjournments into the Exchequer Chamber: and the reason of that, they said, was that it would be absurd to ask the Judges of *C. B.* whether they would advise this court to reverse a judgment given by themselves.

What is to be done where the court are equally divided upon a writ of error.

Then the counsel for the plaintiff, Mr. Solicitor General, Mr. *Reeve* and Mr. *Strange*, being asked what method they desired it to be put into; they said, that as the defendants were in possession of a judgment of another court, they could not contend, that upon a division of this court, the judgment of *C. B.* ought to be reversed. But what they insisted upon was, that this cause might be adjourned into

N. B. This was my own argument, the other counsel not being prepared.

into Parliament, that their Lordships might receive the direction of that great court, what judgment should be entered in this cause.

That causes of a civil and criminal nature have been originally commenced in Parliament, they said was a fact too notorious to be denied; and therefore they forbore troubling the court with any instances of that nature, but would proceed to shew, that as the Parliament had taken conuſance of cauſes in the firſt inſtance, ſo they had been applied to for their direction: nay they had interpoſed of their own accord in caſes where inferior courts had been divided, or thought the point too difficult for their determination.

Their firſt citation was a *dictum* of my Lord Nottingham's in the Duke of Norfolk's caſe, where he intimates, that there may be an adjournment *propter difficultatem* out of a court of law into Parliament.

Braët. lib. 1. c. 2. ſpeaking of the ſtability of the *English* laws, that they are not to be altered but by Parliament, has theſe words:
 “ *Si autem aliqua nova et inconfueta emerſerint, et quae prius uſitata*
 “ *non fuerint in regno, ſi tamen ſimilia euenerint, per ſimile iudicentur,*
 “ *cum bona ſit occaſio a ſimilibus procedere ad ſimilia. Si autem talia*
 “ *nunquam prius euenerint, et obſcurum et difficile ſit eorum iudi-*
 “ *cium, tunc ponantur iudicia in reſpectum uſque ad magnam curiam,*
 “ *ubi ibi per conſenſum curiae terminentur.*

Regiſt. 124. b. there is a writ in theſe words: “ *Quia volumus*
 “ *quod querela pendens inter te* (one of the parties to whom it is
 “ directed) *et C. et alios de quadam tranſgreſſione coram nobis et con-*
 “ *cilio noſtro apud Weſtmonaſterium diſcutiatur et terminetur, tibi*
 “ *precipimus quod ſis coram nobis et concilio noſtro apud Weſtmona-*
 “ *ſterium ad quindenam ſancti Michaelis (quem diem praefato C.*
 “ *dedimus) tunc ibidem ad informandum nos et concilium noſtrum*
 “ *ſuper negotio praediſto, et ad faciendum et recipiendum quod per*
 “ *nos et concilium noſtrum praediſtum ſuper diſto negotio conſiderari*
 “ *contigerit.*”

1 E. 3. 7. a. after ſtating the caſe, and what had been ſaid upon it, the book goes on: *Et puis vient breue quod ſi difficultas aliqua interſit, le record ſoit maund en parlement, et adjurner les parties la xv Paſ. et dit fuit al Vicount que il uſt les deniers a meme le jour.* Cotton's Records 30.

My Lord Coke in 4 *Inſt.* 68. takes notice, that at common law before the 14 E. 3. delays of judgment were provided againſt in five manners, and one of the inſtances he is pleaſed to give is, by the

the King's writ, comprehending, *quod si difficultas aliqua intersit*, the record should be certified into Parliament, and to adjourn the parties to be there at a certain day. *Si obscurum et difficile sit judicium, ponantur judicia in respectum usque magnam curiam.* And of this says he, there was an excellent record in the Parliament holden at *Westminster* the *Tuesday* after the translation of *Thomas a Becket*.

The last citation was the case of *Nevil v. Stroud* in 2 *Sid.* 168. which begins with telling us, that the case had been often argued in *C. B.* and by them delivered into Parliament, who took order therein. Which they relied on as a stronger case than the present, for that being in *C. B.* where the cause originally commenced, it was a case within the same measure with all other Exchequer Chamber cases.

But if the court was not inclined to proceed in that extraordinary manner, then they said, that rather than undergo the delay and expence of an argument in the Exchequer Chamber, they were content to go up to the House of Peers under the disadvantage of the judgment's being affirmed in this court. And if there was any difficulty with the court as to affirming a judgment upon a division, where the party consents, they put it upon the other side to shew the expediency of such a method.

Then the counsel for the defendants being called upon, they declared, that they did not desire to have the judgment affirmed. Which obliged the plaintiff's counsel to go on and argue for an affirmance.

They said, they had inquired into the practice of the Exchequer Chamber erected by the statute of *Eliz.* for correcting the judgments of this court, where upon a division of four and four the judgment is affirmed, as was done in the great case of *Deighton v. Greenvil.*

They likewise relied on it as an argument for affirmance, that there were no instances of adjournments into the Exchequer Chamber upon a writ of error, which in a great measure proves the practice of affirming a judgment upon a division; since there is as much likelihood of a division upon a writ of error, as in any other case, where causes have been so adjourned.

So is the practice of the House of Lords: and though that may be said to depend on their practice of putting the question only to reverse; yet that shews the sense of that house, that without a majority for reversing, the judgment ought to be affirmed.

Many judgments they said had been affirmed, even where the whole court must have been of opinion, that the judgment was erroneous: it is a rule that the party shall not assign for error any matter that is for his advantage, as too long an effoin, or the granting aid where it ought not, and yet that is error in the proceedings. 7 H. 6. 21. a. And the court must see and adjudge it to be so, but yet because they are not told of it by a proper person, the judgment shall be affirmed; and what is that but to affirm an erroneous judgment? And many instances of this nature are put in 5 Co. 39. b. and 8 Co. Beecher's case.

If the defendant in error pleads a release; and it is found with him: this is a confession of the errors, but yet in *Aston's Ent.* 339. the entry is, that the judgment be affirmed.

Ante 68.

In the case of *Jones v. White* on a trial at bar, Mich. 4 Geo. B. R. the question was, whether the coroner's inquest could be read, in a suit between party and party, the present Lord Chancellor, and Mr. J. Powys, were of opinion it might, Eyre and Pratt Justices were of a contrary opinion, but Pratt J. after delivering his opinion, did so far retract, as to consent it should be read in that case. And in the case of the common council-men of London, the present Chancellor did consent to discharge a rule, that the parties might not be hung up for ever, and there too was an equal division of the court.

But if the party was not intitled to demand an affirmance in this case, yet they said it might be done upon their consent, *consensus tollit errorem*, and no injury was done them, if they were willing it should be so.

Upon the whole therefore they submitted it to the court, that this was not a proper case for the Exchequer Chamber, that it might go by adjournment into Parliament. Or if that method was thought impracticable, then they were willing to make this case an exception out of the general rule, *quod judicium redditur in invitum*, by their consent that the judgment given below should be affirmed.

Whereupon the court took time to consider of it, and in Michaelmas term following Pratt C. J. delivered the resolution of the court.

It was our misfortune the last term to differ in opinion, and I find we continue still under that difficulty; so that now we are to consider,

consider, what is to be done upon this division, for the cause must not be hung up for ever.

By the statute 14 E. 3. it is provided, that whereas causes have been delayed for difficulty and division in opinions, therefore to remedy the delays occasioned thereby, there shall in every Parliament be chosen a prelate, two earls and two barons, who by good advice of others, are to give judgment; or if they cannot determine it, that then the record shall be brought into Parliament, who shall make a final accord, and the Judges before whom the cause is depending, shall proceed to give judgment pursuant to their directions.

But we can find no footsteps for hundreds of years of any such appointment of a prelate, two earls, and two barons. So that it is to no purpose to think of putting the parties into that method. But into some method we must put them, that there be not a defect of justice.

Now in the first place we are all of opinion, that it is improper to adjourn this cause into the Exchequer Chamber. We have caused strict search to be made, and can find no instances of adjournments upon writs of error; nor can there be any colour for such a practice, it being absurd for us to ask the opinions of Judges who have before given judgment in the cause.

We are asked in the next place to adjourn this cause into Parliament. As to this we are all of opinion, that we have no power so to do. It would be the highest presumption in us, of our own accord to attempt it, without the King's writ. If such an one had been brought us, we might perhaps have gone into such an expedient, but the parties have not thought fit to purchase such an one. N. B. We who were counsel for the Dukes, did not think it advisable to get such a writ: because all that the Lords could have done upon it would be, to direct the King's Bench what judgment to enter, after which a writ of error would lie in Parliament in the common form: so we chose rather to have the judgment affirmed upon us, that we might have it determined at once in the House of Lords. Lill. Ent. 524.

But then the plaintiffs in error move us for an affirmance: as to that you see the court is divided, and there can be no rule: but in this case, because the party against whom it is to be affirmed, is desirous and willing it should be so, we are all of opinion that upon his consent the judgment of the Common Pleas may be affirmed.

But lest this be brought in future ages as a precedent of an affirmance upon a division, we direct the officer to make the rule
special

special in this case, on recital of the difference in opinion amongst the Judges, and the consent of the party.

Whereupon I moved on behalf of the Duchess, that in regard this was not an affirmance upon the merits, the court would give some directions as to the costs. But they refused to do any thing in that, and said, it must take the common course of an affirmance. But the defendants in error were afraid to take any costs, whereupon the judgment of affirmance was entered up in common form, but without costs. And upon a consultation we were all of opinion, that it should not be a special entry according to the rule, because then we should lie open to an objection in the House of Lords, that we were striving to reverse a judgment, which by the record appeared to have been affirmed by our consent.

Afterwards the 23d, 24th and 25th of *February* 1720. this cause was heard in the House of Lords, where all the Judges were ordered to attend, and give their opinions: the Chief Justice and *Fortescue* were for reversing, and the other ten, who would not say that the recoveries were good, were nevertheless of opinion, that the Duchess could not enter during the life of *Philip*. And the house thinking that to be a material objection, affirmed the judgments given in the courts below. *Quære tamen*, for that seems to be the weakest point in the cause; and how it is possible to distinguish between the recoveries and the life of *Philip* I cannot conceive, for if *Philip* may take, then must *Charles* have the same capacity of taking; and on the other hand, if *Charles* could not take, so as to enable him to suffer the recoveries, then the same objection will go to *Philip* also.

Anonymous. In C. B.

Feigning bail,
cause for the
pillory.

TWO people put in bail in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on the statute 21 *Jac.* 1. c. 26. So the court ordered them and the attorney to be set in the pillory, which was done accordingly.

Dominus Rex *vers.* Major' et Alderman' Civit' Carliol.

UPON return to a *mandamus* to restore one *Poulter* to the office of capital citizen of *Carlisle*, the case was thus:

The corporation consists of a mayor, aldermen, bailiffs, and capital citizens, who together make a common council, and have the power of election of capital citizens: the power of amotion is in the mayor and aldermen only, or the major part of them: then the return sets forth, that such a day the common council was assembled, and *Poulter* being summoned did not appear, and thereupon the mayor and aldermen *sic ut praefertur assemblat'* made an order for his amotion (for a cause allowed to be legal.)

Where particular powers are lodged in a select number, they cannot separate and act upon a general summons of the whole body, but there ought to be a particular summons for that purpose.

Fazakerley. There ought according to *Bag's* case, 11 Co. 99. to be a summons to appear at such an assembly as has the power of amotion, which is wanting in this case. The summons was not to meet and execute the power as mayor and aldermen, but to join with others in execution of other powers, which they had as a common council: and when they meet in that capacity, they are to be considered as distinct persons from those who upon other occasions meet as the court of mayor and aldermen only. They cannot, when they come together upon a summons to meet only as a common council, divide, and execute other powers. Such clandestine proceedings are never to be allowed, for at this rate any man may be tricked out of his freehold. When an alderman is summoned to the common council, he may think there are only acts of course to be done, and so absent himself; when he would not have failed being there, had he apprehended an act of so great consequence was to be done as the depriving a man of his freehold: nay by this means a few may so contrive it, as to fall upon this business at a time when they find others who would oppose such arbitrary proceedings may be out of the way. There ought to have been notice of a special meeting, in order to do this act. *Dav. 48. a. 3 Bulst. 189. 1 Roll. Rep. 409.*

Bootle contra. There could be no special summons for this purpose; because till the assembly was met, it could not be known whether *Poulter* would appear or not. As to the case in *Bulst.* that did not appear to be a corporate assembly; and *Holt* Chief Justice said of it, that it might only be a meeting in their natural capacity, to feast or the like. But this appears to be a corporate assembly: they are assembled in common council. And when they were together

ther, why might they not execute the power they had, without the formal dissolution of that assembly and calling a new one?

Chief Justice. The powers of the common council, and of the mayor and aldermen, are distinct: the common council can do no acts, unless assembled in that capacity: neither can the mayor and aldermen, unless they met only as such, upon a regular summons for that purpose: as they had distinct authorities, they must be summoned in their distinct capacities: here was no summons to meet as mayor and aldermen only, the consequence of which is, that the acts done by them in that distinct capacity are void. Consider how the case stands; an alderman when he receives a summons to appear at the common council, considers with himself, that they are a great many of them, and probably his single voice will not be wanted, and therefore he stays at home: but when he is summoned to meet with the mayor and other aldermen only, then, says he, there are but twelve of us in all, and therefore my voice and advice (which the others have a right to) may go a great way: besides, the powers lodged in us as a court of mayor and aldermen are of an higher nature than our other powers; and therefore upon both accounts my presence may be necessary, and I will be sure to be there. All this is natural enough, and is it then reasonable the others should proceed to act as mayor and aldermen only, when they come together in common council? What a confusion would this make in the city of *London*, if when the whole body is got together, they should all of a sudden draw off into different parties, and execute their distinct powers? It weighs nothing with me, that the cause of removal happened fitting that assembly, for they ought to have broke up, and summoned him again to appear before them in their distinct capacity.

Powys Justice accord as to the main, but doubted, because the offense arose fitting that assembly.

Eyre Justice. The summons ought to have been of such an assembly only as has power to remove, else it may be liable to the inconvenience of surprize: not that a summons to meet and do any particular act is necessary, for that would be endless, but only to meet in their distinct capacity. Incidental powers are in the whole body only, but yet constant experience (and so is *Bagg's* case) tells us, that if any select power (which if not affirmatively given would be incident of course) is vested in a select number; that is exclusive of the other part of the corporation. A power of making by-laws is incident to every corporation, but yet in many they are made by a select number.

Fortescue Justices Being summoned to appear at the common council, which includes the mayor and aldermen, he was consequently summoned to appear before the mayor and aldermen, the whole including every part; and upon this foundation it seems to me that the removal is well enough.

Afterwards it was spoken to by the Solicitor General and Mr. *Willes*, who cited *Braithwaite's* case, 1 Vent. 19. 2 Keb. 488. where the power of removing a common council-man was lodged in the mayor, and such burgeses as had been mayors; and then the return sets out, that a common council assembled such a day, and *Braithwaite* being summoned did not appear, whereupon he was the same day amoved by the mayor and burgeses, as the charter directs.

To this case it was answered by the Solicitor, That this exception did not appear to have been taken in that case, nor did it appear by the report, that the removal was whilst they were assembled as a common council, but only that it was upon the same day, which might be upon another summons to meet in their distinct capacity. That it was a strange case, wherein the Judges asserted the power of the King and Council to disfranchise members of corporations by their order, and even to pull down the walls of a town; so it might be they went upon such an order, and every body knows matters of prerogative went very high at that time: he said no record of that case was to be found. *Et per C. J.* I am very glad of it; I can have no regard to any opinion that was given, when Judges were worked up to so extravagant a pitch, as to assert such doctrine.

Adjournatur. And the last day of the term the Chief Justice delivered the opinion of the court, that the removal in this case was not regular, for there should have been a summons for the mayor and aldermen to meet in their distinct capacity.

Peremptory mandamus agard.

Hoyle vers. Lord Cornwallis. Pasch. 5 Geo. rot. 309.

ON error *e C. B.* the writ of inquiry appeared to be executed on the 15th June, which upon looking into the almanack appeared to be Sunday, and it was objected by *Reeve*, that this is made void by the 29 Car. 2. c. 7.

A writ of inquiry cannot be executed on a Sunday, and the court is bound to look into the almanack.

Strange

Strange contra. This objection must take its rise from some clause or other in that statute, for it cannot be pretended that the execution of this writ was void before. At common law things of a much higher nature than this might have been done on a *Sunday*. Before the statute of 5 *Ann. c. 9.* a man might have been taken on an escape warrant. *Salk.* 626. And even now process of ecclesiastical courts, as citations and the like, may be affixed on a church door, which is a service of those citations. *Ibid.* 625. A fair might be kept on a *Sunday*. *Cro. Jac.* 485. And the hundred was liable for a robbery. The question therefore is, whether there be any words in the statute to reach this case, and I take it, the execution of a writ of inquiry is not such an act, as is, or was designed to be made void by that statute. The words are, "Provided also, that no person or persons on the Lord's day *shall serve or execute* any writ, process, &c. but that *the service* of every such writ shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, as if he had done the same without any writ."

Now it is observable, that there is a very material variance in the penning of the latter part of this clause from the former, for though it at first prohibits the serving or executing any writ upon a *Sunday*, yet when it comes to limit what effect those proceedings shall have, it only makes the service of such writs void; but does not extend to annul the execution of such writs which are not to be served upon the party; and by the latter part, which gives remedy to the party grieved, that word *service* is explained, to extend only to process which is to be served upon the body or goods of a man: now the nature of executing writs of inquiry is not by any summons to the party, but only a private execution of a power given to the sheriff, which is no injury to the party: he is not grieved by the execution of this writ on a *Sunday*, any more than if it were any other day. The statute only makes the service of writs void, but this inquiry can by no means be called a service of any writ, and therefore is not made void by the statute. And it will be no answer to say, that by using the word *serve or execute* both in the former part, it is manifest the Parliament intended to take in one case as well as the other, for this being a statute made in restriction of the common law, it is to be construed strictly, and not to be taken by equity.

But if the statute should be thought to extend to this case, yet I apprehend the court is confined to judge only upon the record, and cannot take notice that the 15th of *June* was a *Sunday*, unless it had been specially assigned for error; and that the court will not

pray

pray in aid of the almanack, in order to reverse a judgment. In 1 Roll. Abr. 524. C. 3. it is held, that if one of the proclamations on a fine be the 7th of June, which is a Sunday, yet unless it appears on the record to be Sunday, the court will not take notice of it, without express averment. And accordingly the constant course has been to assign that matter for error. So 1 Sid. 300. If a writ be returnable at a general return, the court is not obliged to take notice what day of the month it is. Cro. Car. 53. *Morris v. Fletcher*. There the writ was returnable *die lunae prox' post quinden' Hil.* and executed 27th of January; and the court would not go out of the record, to inform themselves that the 27th of January was after the return of the writ: so is 9 Co. 66. *Mackally's case*. 1 Roll. Abr. 525. pl. 14. By the statute of 31 E. 3. the sheriff's turn is required to be held *infra mensem post festum Paschae*; the defendant justified for an amerciament at a court held 18th of April. And though in fact that was within a month after Easter, yet the court refused to look into the almanacks and set it right; and then *a fortiori* you will not do it in this case, where instead of supporting the judgment the consequence will be to overthrow it. And if the proclamation on a fine (which is the act of the court) shall not be set aside without a special assignment, surely this execution of a writ of inquiry, which is but a ministerial act, an act done out of court, shall not; according to the distinction taken in *Mackally's case*, where it was held, that though judicial acts done upon a Sunday are void, yet ministerial acts are not.

Reeve replied. The intent of the statute was to prevent all acts, which are proceedings in a cause, from being done on a Sunday. The words *serve and execute* are synonymous, so that service in the latter part includes execution also.

I agree the cases are as cited, but they have been denied of late years, for now the calendar is looked upon as part of the law of the land. *Salk.* 626.

C. J. By dropping the word *execute* it should seem as if no process was made void but such as is to be served upon the party: to affirm a judgment we will look into the almanack, but I think we are not bound to do it to reverse one.

Adjournatur. And at another day all the court were of opinion, that the execution of the writ on a Sunday was void, and that they were bound to take notice of it, without being specially assigned for error; and accordingly would have reversed the judgment, but the counsel desiring to have time to apply to C. B. it went over, and afterwards the Common Pleas was applied to, and refused to amend, and I never heard any more of it.

Michaelmas Term

7 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

} *Justices.*

Gardner *vers.* Claxton.

Where the plaintiff in error pleads to the *scire facias*, there shall be execution if it goes against him, but the writ of error shall proceed.

STRANGE moved to set aside an execution taken out upon a judgment in a *scire facias quare executio non*, because they had assigned their errors before: and cited *Heath v. Street* in this court, *Trin. 2 Geo.* where *Parker C. J.* laid it down as a rule, that if the plaintiff in error comes in at any time before execution, and assigns errors, proceedings ought to be stayed on the *scire facias*, because they have had the effect of it in bringing the party into court.

Upon this it was referred to the master, and upon motion for his report *Reeve contra* agreed the case of *Heath v. Street* as cited, but that it was only an extrajudicial opinion, and argued the delay that would follow, if the plaintiff in error be at liberty to spin out the *scire facias* to the last.

The master reported an old rule of court, that if the party pleads to the *scire facias*, and it goes against him; execution may be sued out, but that the writ of error shall go on notwithstanding. Whereupon the court in consideration of the delay established it as a standing rule for the future, that if upon the return of the *scire facias* the plaintiff assigns his errors, then all farther proceedings shall be stayed upon it; but where he chuses to stand out upon pleadings to the *scire facias*, execution shall go if it be adjudged against him.

The case of Mayo and Parsons.

BY the statute 12 *Ann. st. 1. c. 2.* it is provided, That if any malt happens to be burnt after the duty paid, the proprietor may apply to the next quarter-sessions, who are to adjust the *quantum*, and give him a certificate, which intitles him to receive back the duty. *Mayo* and *Parsons* were two brewers, and had a great quantity of malt that had paid duty burnt in the late fire at *Wapping*; but the sessions being then very near, they could not remove the rubbish so as to make an estimate of their loss before the sessions was over. The following sessions they made their application, where the *quantum* of the loss was adjusted; but then the entry of the act of sessions goes on, that the justices being of opinion, that the jurisdiction was given only to the next quarter-sessions after the fire, and there having one quarter-sessions intervened, therefore they for that reason deny the certificate.

What acts of the sessions are removable by *certiorari*, and what not.

Serjeant *Darnall* moved for a *certiorari* to remove these proceedings, and cited the case of *Limehouse*, where an entry of a refusal to proceed on an appeal upon pretence of its being too late was brought up and quashed. But Mr. Attorney General shewing cause against the *certiorari* objected, that this was no order of sessions, and a *certiorari* goes only to fetch up their orders: and of this opinion was the court, and denied the *certiorari*; and *Eyre J.* remembered the case of the Bishop of *St. David's*, where an entry that he had prayed a prohibition for such and such reasons, *et ei non conceditur*, was held to be no judgment, so as to be looked into and corrected upon a writ of error.

L. Raym. 539.

Denial of a prohibition no judgment of the court.

Bayly *vers.* Boorne.

Of the power
of a Judge of
an inferior
court over the
proceedings
before him.

THE defendant in the beginning of the long vacation was arrested by process out of the sheriffs court, and gave bail, and for want of a plea judgment was signed. And after several motions in the court below to set it aside, the plaintiff moved here for a *mandamus*, to compel the Judge to give judgment final upon the inquiry; and a rule being made to shew cause, the defendant produced an affidavit that he was a person unacquainted with the methods of legal proceedings, and that soon after the arrest he applied himself to Mr. Bennet, a gentleman of the bar, who (taking it to be an arrest out of a superior court) told him the process could not be returnable till the next term, against which he must employ an attorney to put in bail, and receive a declaration: under which advice he acquiesced, and heard nothing further of the cause, till a little before the term, that notice was given of the execution of a writ of inquiry: and therefore this being a plain surprize, he hoped the court would not order the Judge below to give judgment, but let him in to try the merits of the cause, upon his proposal to bring the money recovered (which was considerable) into court. To this it was answered by the plaintiff's counsel, that there appeared no irregularity on their part; and upon this the question arose as to what power the Judge of an inferior court had in cases of this nature.

And as to that the whole court agreed, that the Judge of an inferior court could not grant a new trial, for this is a power that even in superior courts is not of any great standing, the first instance of any new trial being in *Stiles*; and besides, the case of an inferior court had the same objection to it as there is to granting a new trial after a trial at bar, *viz.* because it will be tried the second time before the same Judge.

But they all held clearly, that for matters of irregularity, where the proceedings were contrary to the practice and rules of the court, the Judge of an inferior court might set aside a judgment; but whether he should be allowed to exercise his discretion, in setting aside judgments, where the plaintiff was regular, was a question they said deserved consideration.

But they waived the discussion of that point, by saying there was a middle way in the case, which was to inquire into the surprize; and intimated to the Judge, that the refusal of the plaintiff to try the merits, upon having the money brought into court,
was

was some evidence of fraud: and therefore they gave leave to the Judge to examine, whether there was any fraud or surprize, and to set aside the judgment if he found any.

Upon inquiry below, the officers swore, that when they arrested the defendant he asked them by what process, and they told him it was an action in the sheriff's court.

This having destroyed the pretence of surprize, the Judge below refused to set aside the judgment.

Between the Parishes of Maidstone and Dething.

IT was held well enough in an order of removal, to shew a complaint that the party is come into the parish of *A.* and is likely to become chargeable, without saying farther, *to the said parish of A.*

The adjudication need not mention what parish the party is likely to become chargeable to.

Dominus Rex *vers.* Justic' de Dorchester.

A *Mandamus* issued to the justices to sign a poor's rate made by the churchwardens and overseers. Before the return a motion was made to supersede it, for several objections to the fairness of the rate; and that this would be speedier and better for the poor, than to reserve the debate of them for a formal return. *Sed per curiam*, The two justices are necessary to sign the rate only by way of form, for it is the churchwardens and overseers that have the power of making it; and whether it be a fair rate or not is proper for the jurisdiction of the sessions, and was never intended for our examination.

B. R. will not meddle with the goodness or badness of a poor's rate.

The *superfedeas* being denied, the justices returned, that they could not allow the rate, it not being a just and proper rate: and the court having before given their opinion of this upon the motion, they resented this usage so far, that they quashed the return, and ordered an attachment against the justices, who thereupon submitted and returned *quod ratam allocavimus*.

Carbonel *vers.* Davies.

Trin. 6 Geo. rot. 389.

Reference
where to the
next antecede-
dent, and
where not.

CASE upon a promissory note, set out to be made 2d of November 1719. to pay on the 31st of *December next*. Lee objected that the plaintiff had brought his action before the note was payable, for the word *next* does not refer to the date of the note, but the time the plaintiff is declaring, which was in *Trinity* term, when he is here made to say, that at that time the defendant had not paid him a sum of money, which he was obliged by note to pay in *December next*: and he cited the case of an indictment for a forcible entry into lands, *existen' liberum ten'tum* of J. S. and for want of *tunc*, it was held that the *existen'* could not refer to the day of the forcible entry, but only to the exhibiting the indictment, and for that fault it was quashed.

Sed per curiam, We must take it *secundum subjectam materiam*, and as a translation of the note, and then it can be no otherwise than a note of 2d of November 1719. to pay in *December next*, which is next after the date of the note. The plaintiff had judgment.

Dominus Rex *vers.* Philips.Hil. 6 Geo. N^o 30.

Where the
defendant sets
out a bad title
to the office,
the court will
give judgment
on the plea, as
importing a
confession of
the usurpa-
tion.

Information *in natura de quo warranto* for usurping the office of mayor of Bodmyn.

The defendant by his plea makes title under two charters, one 11th. of March 5 Eliz. whereby the inhabitants were incorporated by the name of mayor and burgeses, and after appointing who shall be the first members of the corporation, it goes on and provides for the election of others on their deaths; and as to the mayor it is provided, that on *Michaelmas* day in every year the mayor, burgeses and common council, or the major part of them, shall assemble and nominate two capital burgeses, out of whom the inhabitants are to chuse one to be mayor, who being so chosen should take an oath to execute the office of mayor for the next year and till another should be chosen.

The

The other charter was 30th April 36 Eliz. wherein the Queen reciting the former manner and time of election and the continuance in the office under such election, and reciting further that the corporation had petitioned her, *quatenus* she would alter *modum et tempus eligendi* of the mayor; therefore she confirming all their former rights and privileges, appoints the election to be for the future by the mayor, common council, and town clerk, on the 24th of September *pro uno anno integro tunc proxime sequen'*. And then he avers, that as well before as since the second charter, the usage has been, for the mayor to hold over till another was chosen, and that he being elected mayor served for a year, and the town clerk being then dead, and no new one chosen, there could be no new election of a mayor; *et eo warranto* he claims to hold the office of mayor till another shall be elected and sworn, and traverses the usurpation.

The Attorney for the crown prays *oyer* of the last charter, which being set out, there appears a further clause, whereby the Queen abolishes all the former manner *eligendi, nominandi et appunctuandi* of the mayor; and then takes issue, that since the charter of 36 Eliz. there has been no such usage of holding over: which goes down to trial, and is found for the King.

It was now moved in arrest of judgment, that this was an immaterial issue, because it not being a corporation by prescription, the title to the office must depend upon the charter, and not upon any usage within time of memory; and that this is worse than most cases of immaterial issues, for they are often good if found one way, and bad the other, as *solvit ante diem* is good if found for the defendant. But here the finding for the King can neither destroy, nor could a verdict for the defendant have established his right, because his right does not depend on any usage inconsistent with the charter, but must stand or fall by the charter itself.

And without much argument the court was clear in opinion, that this was an issue totally immaterial. But then the question arose, what the court should do in this case, whether they were to award a repleader, or laying the replication out of the case proceed to give judgment on the defendant's plea.

And for a repleader it was argued by Mr. Solicitor General, that the court could not give judgment on the plea, for every judgment must be either, 1. On an issue in fact, found by verdict. 2. Issue in law, on demurrer. 3. *Nil dicit*. Or, 4. Confession. 1. As to the first, it is admitted there is no good issue in fact, and consequently no good verdict to found the judgment upon. 2. Here is no issue

issue in law, for want of a demurrer. 3. It cannot be by *Nil dicit*, for the defendant has pleaded. 4. The only question is, whether this plea can be taken to be a confession of the usurpation; and I take it, it cannot, for though an usurpation is charged, yet it is so far from being confessed, that he expressly denies it in his traverse; and relies upon it that he has a good right: he admits the user, but not the usurpation, the charge upon him is, that he has exercised this office without lawful authority; it is true, says he, I have exercised this office, but I insist that I had a good authority so to do; and now will any body say, this is a confession of the usurpation?

But then it is objected, that if the title set out is ill in point of law, then the admission of the user is a tacit admission of the usurpation. To this I answer, 1. That the title is good in law under the two charters, taking them together. By the first charter the mayor being elected by the inhabitants on *Michaelmas-day* is to hold for a year and till another is chosen. The second charter which was made to alter the *tempus et modum eligendi* only, says he shall be chosen by a select number and upon 24th *September*. But it does not meddle with the right of holding over; on the contrary it expressly confirms all their former rights and privileges, of which this of holding over was one. And it will be hard to say, that an alteration in the manner of *electing* only, shall take away the former right which the officer when *elected* had in the office, especially in a point which tends so much to the preservation of the body corporate.

2. But if the plea should be ill in point of law, yet the court cannot give judgment that it is so, till it comes properly before them. If they may, then whenever a vicious plea is put in, the court may without the party's answer or demurrer give judgment upon it immediately; and that will be the case here, for now the replication is out of the case, and we stand before the court only upon the information and the plea. In 1 *Lev.* 32. *Serjeant v. Fairfax* the issue was held immaterial, and the defendant's plea a naughty plea, but yet the court did not give judgment upon it, but awarded a repleader.

Pengelly Serjeant contra. The defendant in his plea has made no good title to this office, for the second charter is what he must stand or fall by, and in that there is no provision for holding over.

But say they, in the first charter there is, and that continues in force as to every thing in which it is not altered by the subsequent charter.

The force of this depends upon that question, whether the second charter is not the entire rule to go by as to the office of mayor. And that it is, is plain from the clause which abolishes all the former method of election, and if the former method of election be abolished, surely an incidental right under such election will be gone also. The right of election is transferred to other persons, and can there be a duration under an election, when the foundation of that holding over is gone? *Pro uno anno integro* is the same as if *tantum* had been added, and the acceptance of the charter is general, without any reservation of the former right of holding over. 1 *Ven.* 297. 2 *Mod.* 95.

And as the plea is ill, we take it judgment may be given upon it, for he has confessed the user; and as to the traverse of the usurpation, that is so immaterial, that in Sir *Peter Delme's* case, and the case of *Honiton*, it was held, the crown could not take issue upon such a traverse. Whoever admits a user, confesses at the same time that he is guilty of an usurpation, unless he makes a title to the franchise; as in the common case of a justification in trespass or for words, where it amounts to no justification in law, judgment may be given upon the confession. 2 *Roll. Abr.* 98. *pl.* 2. 99. *pl.* 1. 3. *Cro. Eliz.* 228, 214. 22 *Ed.* 4. 46. *b.* *Salk.* 173.

Mr. Solicitor General replied. The corporation could not do any otherwise than accept the charter in general, for it cannot be accepted in part, or with qualifications. I agree *tantum* is implied in charters of original creation, but not in charters of confirmation.

Chief Justice. We are moved on behalf of the defendant, that we will grant a repleader: that is in other words that we should give this cause a further delay, whilst he is holding over all the while. Now consider, that if we should grant it, the defendant cannot mend his case: for the plea will stand, and after the formality of a demurrer we must give judgment upon the goodness or badness of the plea. The Attorney for the crown does not pray a repleader, neither would the granting one do him any good, for we cannot better his case, but must rest it upon the demurrer. And therefore as it will answer no good purpose either way, we certainly will not grant a repleader, if there be a more expeditious way of coming to the end of the cause; and I think there is, for if the plea be ill, I am of opinion it amounts to a confession of the usurpation, and that is warrant enough to ground our judgment upon.

Now the validity of the defendant's title, as he makes it in his plea, depends upon the question, whether the right of holding over

subsists under the second charter. And I hold it does not; for it is very observable, that the second charter where it recites the former, takes express notice of the clause for holding over; and then when it comes and abolishes all the former method of election, and appoints it to be in another manner, and that the mayor shall continue in for a year, it cannot be imagined but that this right of holding over was intended to be abolished also. Suppose the second charter had said, that the mayor shall continue in for three quarters of a year; will any body say, that the reservation of their former privileges should intitle him to hold on for the other quarter under the old charter; I believe no body will think so; I think this is not to be distinguished from the case of an ill justification in trespass, and therefore as the plea is ill, and contains no title to the franchise, I am of opinion, we may give judgment upon it, as confessing an usurpation.

Powys Justice. I am of the same opinion, for if we should grant a repleader, I do not see how we can have any new light in the cause.

Eyre Justice. If the defendant's plea had confessed the usurpation, I should think it proper enough to give judgment upon the plea: but I do not think any more is confessed by it than the user. The second charter it is plain was made only for particular purposes in relation to the election, but meddles not with the duration in the office; and therefore I can never agree, that any affirmative words in the charter can take away so great a privilege as that of holding over is, and a privilege too that may often serve to prevent the extinction of the corporation; especially when it provides that all the former rights of the corporation, not altered by the subsequent charter, shall still continue. And as to the clause of abolition, that is expressly confined to the authority, form and manner *eligendi*, but not a word of any right *tenendi*.

I think he is not a new mayor absolutely, but as to the right of holding over it subsists in him under the former charter; the consequence of which is, that he has confessed no usurpation, and then no judgment can be given against him upon the plea.

Fortescue Justice. The defendant cannot mend his case, because the plea is good in form, though not in fact; which is a distinction always taken into the doctrine of repleaders: and of this opinion was *Holt* Chief Justice, in the case of *Jones v. Bodinner*, *Salk.* 1. where he said, that if the fact be admitted, there shall be no repleader, but a judgment upon the confession.

Here the defendant admits the user, and then the usurpation is a consequence of law, and that is the reason why it is not traversable. Every justification, to make it a perfect one, must both confess and avoid; and where it does not do the latter, the confession stands.

As to the merits of the plea, I think the power of holding over is gone upon the second charter; for the *modus eligendi* takes in all the circumstances of the election, and the duration in the office is one of those.

Besides, as the day of election is altered, there can be now no holding over under the old charter, for that only empowers him to do it from *Michaelmas-day*; but then what right has he to hold over from the 24th of *September* till that time? I am of opinion that judgment may be given immediately.

Per curiam, Judgment for the King. And the corporation petitioned for a new charter.

Taylor *vers.* Dobbins.

Pasch. 6 Geo. rot. 183.

IN case upon a promissory note, the declaration ran, that the defendant made a note, *et manu sua propria scripsit*. Exception was taken, that since the statute he should have said that the defendant signed the note, but the court held it well enough, because laid to be wrote with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. *I J. S. promise to pay*, is as good as *I promise to pay*, subscribed *J. S.*

If the note be of the defendant's own writing, it need not be said in the declaration, that he signed it.

Mills *vers.* Bond.

Trin. 6 Geo. rot. 382.

IN debt on a bail-bond, exception was taken, that the original process appeared to be returnable at a day out of term. *Fazakerley* said, they should have pleaded the statute of *Hen. 6.* But the court held it not necessary, this being a void process. And the plaintiff prayed leave to discontinue.

Writ returnable out of term avoids bail-bond taken on it, and that without plea.

Perry

Perry *vers.* Edwards.

Pas. 6 Geo. rot. 83.

A covenant to
save harmless
against all
persons, ex-
tends not to
tortious acts:
secus where it
is particular a-
gainst the acts
of a particular
person.

ERROR *a C. B.* in an action of covenant, wherein the plaintiff sets forth a covenant, which recites, that the defendant had sold a certain quantity of goods to her testator, which had been arrested at *Archangel* by one *Edward Bell*, and therefore the defendant covenants to save him harmless from any costs or damages relating to such seizure: and then assigns for breach, that the said *Edward Bell* having arrested the said goods *praetextu* of a debt due from the defendant to him, touching which arrest the testator was put to 1500 *l.* expence, which the defendant had neglected to pay.

There were several pleadings in the cause, which are now out of the case, the question turning upon the declaration.

To which *Wearg* objected, that the covenant does not extend to tortious acts, for which the plaintiff had a remedy; and therefore the title of *Edward Bell* ought to have been set forth, 4 *Co.* 80. *Vaugh.* 118. *Cro. Car.* 443. and that *habens legale titulum* is not enough. 2 *Saund.* 177. 1 *Mod.* 219. 2 *Ven.* 61. *Cro. El.* 828. *All.* 41. *Mar.* 40. Here it is only said *praetextu*, which is not so much.

Reeve contra, agreed it to be a general rule, that in these cases the plaintiff must shew a title in the disturber; but then it extend only to the case of a general covenant, and not where it is particular against the acts of particular persons, for there it takes in even tortious acts. *Cro. El.* 212. *Hob.* 35. 1 *Roll. Abr.* 431. 2 *Lev.* 37.

Et per curiam, This pretence of *Bell's* being recited in the covenant, shews it was meant a security against it in all events; and though it should be tortious, yet being particular, it comes within the difference that has been well taken.

Adjournatur. And *Hil. sequen'* the plaintiff had judgment, the defendant's counsel declining to argue it.

Hillier *vers.* Frost.

THE court at the fide bar made a rule to amend the return of a *scire facias* from *die Veneris in crastino sancti Martini* to *die Sabbati*, Friday being the feast of St. Martin; and now Ketelbey moved to discharge it, because not a proper motion for the fide bar; nor can the court amend the writ, but the proper way would be to quash it. I was counsel in maintenance of the rule, but had little to say for it, so it was discharged; and I moved to quash the writ, which was ordered accordingly.

Scire facias,
not amenda-
ble.

Rex *vers.* Gwyn Major' de Christ-Church.

ON a trial at bar the question was, whether *A. B.* at the time he did a corporate act, was an out burges or not. And to prove he was, the defendant, who had a rule for copies *omnium librorum et recordorum burgi praed'*, produced a copy of a letter fifty years old, and found in one of the corporation chests, wherein *A. B.* is mentioned to be of another place: but the court refused to hear it read, because not a corporate act within the rule, so that a copy is not evidence, but the original ought to be produced.

What copies
of corporate
acts may be
given in evi-
dence.

Webb *vers.* Thompson.

IN Michaelmas 6 Geo. the plaintiff brought his action, and the defendant put in bail, and in Hilary following issue was joined, and notice of trial given and countermanded, and the defendant was the same term surrendered in discharge of his bail. He lay all Easter and Trinity term, and in the vacation made his escape, upon which the beginning of this term an escape warrant issued against him, which Short now moved to supersede, because the plaintiff having slept three terms, the defendant was intitled to be discharged upon common bail. I opposed this, because he had been guilty of an escape, and therefore intitled to no favour, but he ought to lie till he has tried it by proviso. *Et per curiam*, He is not indeed proper to pray a favour, but it would be hard he should lie by till you think fit to try the cause; for it is not to be supposed one who cannot find bail should be able to bring it on by proviso. And besides, as soon as he is taken upon the escape warrant, he will be intitled to his discharge by the rules of the court; so that to prevent the multiplying vexation and expence, we think proper to supersede the warrant.

Escape war-
rant super-
seded, because
the party was
intitled to be
discharged at
the time of
the escape.

Gynn *vers.* Kirby.

Attorney ordered to pay the costs, where no plaintiff to be found.

THE plaintiff's attorney was summoned before Mr. Justice Fortescue to produce his client; and the Judge thereupon made an order, that unless he was produced in a month, the defendant should by consent be at liberty to sign a *non pros.* He did not produce him, and the *non pros.* was signed: and upon an affidavit, that we could find no such man as the plaintiff, the court on my motion made a rule upon the attorney to pay the costs; and afterwards upon an affidavit that they were demanded and unpaid, I moved for an attachment against him, which was ordered accordingly.

Between the Parishes of Barleycroft and Coleoverton in com' Rutland.

Where a certificate man is sent back, there needs no adjudication of his not gaining a settlement during his stay; and if it appears the certificate was legally allowed, that supplies the want of shewing an attestation.

ORDER of removal from B. to C. reciting that the party had fifteen years since come with a certificate allowed according to the act of Parliament from C. to B. and being now actually chargeable, they send him back to C.

This was moved to be quashed: 1. Because they do not say that during the fifteen years he gained no settlement in B. for a certificate-man may gain a settlement as well as any other. *Sed non allocatur*, for all that is necessary to be shewn is the certificate, and that the party is chargeable, and the length of time makes no difference.

Second exception. It is not said the certificate was attested, but only that it was allowed. *Ser per curiam*, The attestation is by the statute made previous to the allowance, and therefore when they say it was allowed according to the act of Parliament, we must intend it was attested, for otherwise it could not be so allowed. The order was confirmed.

Reeve *vers.* Trindal.

Defendant in appeal of murder cannot be bailed after conviction, without consent of appellant. Comyns 257.

ON the trial of the appeal there were two issues. The first as to a plea in abatement, where the defendant pleaded that he was not a labourer according to the addition of the writ, but a barber chirurgion; which was found with the defendant. The second was upon his plea over to the felony, where the jury found him

him guilty of the murder. And what would be the consequence upon these two verdicts, was a point to have been argued in court. But neither side bringing it on for near three years, the defendant now moved to be bailed, and the appellant said he did not oppose it. *Sed per curiam*, We cannot do it: he is convicted of murder, and therefore we cannot bail him, unless the appellant will actually consent; which he refusing to do, the defendant was remanded.

Gally *vers.* Serjeant Selby. In Canc.

IT is a rule in equity, that though in the case of a mortgage in fee the legal right of presentation is vested in the mortgagee; yet they will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor any time before foreclosure; it not being any part of the profits of the estate. *2 Vern. 401. Adj. 343.*

In equity the mortgagor presents to a living.

S. C. Comyns

Heath *vers.* Percival. In Canc.

THE defendant's testator was partner with Sir *Stephen Evance*; and upon breaking up the partnership it was agreed between them, that all joint bonds by them entered into should be discharged by Sir *Stephen* only; who had an allowance made him for that purpose.

On a bill to discover assets, equity can provide for payment of the debt. 1 Will. Rep. 682.

The plaintiff was a bond creditor of the partners, and some time after the dissolution of the partnership applied himself to Sir *Stephen Evance* for the money; upon which they two came to an agreement, that the bond, which before carried 5 *l. per cent.* should for the future stand out at 6 *l. per cent.* and some interest at the rate of 6 *l. per cent.* was paid accordingly.

Thus it stood when Sir *Stephen Evance* broke, against whom there was a commission of bankruptcy, and the plaintiff came in and had his dividend; and now brings his bill against the defendant, who is the surviving executor of the other partner, to discover assets, and compel him to redeem the bond.

The defendant by his answer confesses assets, but relies on the notoriety of the dissolution of the partnership, and the agreement as to bond creditors, of which the proofs had affected the plaintiff with notice, and that his coming afterwards to an agreement with Sir *Stephen Evance* to let the bond stand out on the advance of 1 *l. per cent.* and taking his dividend on the commission, were a strong evidence of the plaintiff's discharging his testator; and that it was his own

own laches not to take his money, Sir *Stephen* having continued to pay for many years after the partnership expired.

Lord Chancellor. Both parties being now before the court, and no dispute as to the bond or assets; I think it proper to retain the bill, without sending them to law. As to the agreement between Sir *Stephen Evance* and the defendant's testator, that was *res inter alios acta*, which ought not to prejudice the plaintiff, as it will do if it be of any avail, because it tends to lessen his security. I do not think the subsequent agreement for 1 *l. per cent.* advance has altered the case, for the other partner might notwithstanding have come in and been discharged on paying the principal and interest at 5 *l. per cent.* Neither does the plaintiff's taking a dividend prejudice his right at all, for that was an advantage to the defendant, by lessening the debt, so that now he will have an allowance for what the plaintiff received upon the dividend.

Let the master take an account of what is due for principal and interest at the rate of 5 *l. per cent.* and on payment of that, let the bond be delivered up, deducting the money already received upon the dividend.

Leighton vers. Leighton. Ibid.

Perpetual injunction granted after two trials at bar.
1 Will. Rep. 671.

AFTER two verdicts on trials at bar in favour of the plaintiff's title a perpetual injunction was decreed, according to the case of *Lord Bath v. Sherwin* in the House of Lords; which practice was introduced that the right might be quieted in ejectments, (where at law the party is always at liberty to bring a new one) as it was in real actions where the verdict was final. And this was affirmed in the House of Lords.

N. B. There had been several country verdicts to the contrary, but the trials at bar were lost.

Dominus Rex vers. Drew.

Habeas corpus.

DEFENDANT came up on a *habeas corpus* from the *Savoy*, to which it was returned, that for several years last past the *African* company have been a body corporate, and retained the defendant in their service, and sent him to the *Savoy*, to be provided with necessaries, till he should embark for *Africa*, *et haec est causa, &c.* The court discharged the defendant for the insufficiency of the return, and ordered an information against the colonel who listed the men, and the keepers of the *Savoy*.

Poultney

Poultney *vers.* Holmes.

At nisi prius in Middlesex B. R.

THE defendant having a term for years, whereof one year and three quarters was to come, agrees with the plaintiff, that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease. The plaintiff took possession, and now brings trespass against the defendant for a re-entry.

If the lessee reserves the rent to himself on granting over, it is an under-lease, and not an assignment, though he parts with the whole term.

It was objected, that this amounted to an assignment of the lease, and was therefore void by the statute of frauds and perjuries, not being in writing; to which we who were for the plaintiff answered, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and of this opinion was the Chief Justice, and my client obtained a verdict.

Dominus Rex *vers.* Pattle. Ibid.

THE defendant being owner of several houses in *St. Catherine's*, let the rooms out to several families: and for this was indicted on the statute about inmates; but the Chief Justice ruled it not a case within the statute, for the house was not a cottage, and all the new buildings about town would be liable to the same prosecution, there not being four acres laid to any of them: and he held further, that the proviso in the statute for market towns would take in this case; for in this respect, as far as the houses are contiguous, *Wapping* is part of the town.

What a cottage within the statute 31 *Eliz. c. 7.*

As far as the houses are contiguous they are part of a market town. *Rex v. Crookford, Trin. sequ. held so of Enfield.*

Campion *vers.* Nicholas. Ibid.

THE cargo of the ship was lost by the capture of a *Swedish* privateer, who carried her into *Gottenburgh*: the master staid there three months, to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much *per* month whilst they staid there: and in an action for this, the master would have discharged himself, on the rule that freight is the mother of wages, and that none are ever paid while the ship

The admiralty law for wages may be superseded by a special agreement.

is lading and unlading; which the Chief Justice agreed to be the general doctrine: but he held it not sufficient to controul a special agreement, as there was in this case, and where too there was so long a stay at Gottenburgh.

Teshmaker vers. Hundred de Edmington in com' Middlesex.

At nisi prius coram King C. J. de C. B.

If party is robbed on a Sunday going to church, the hundred is liable.
S. C. Comyns 345.

THE plaintiff lived a mile from the church, and going thither with his lady in his coach upon a Sunday, was robbed; and brought his action against the hundred, and recovered; for the statute extends only to the case of travelling: but the Chief Justice said, if they had been going to make visits, it might have been otherwise.

Dutch vers. Warren.

At Guildhall coram King C. J.

On a contract for stock the party who has the difference in his hands is receiver of so much to the other's use.

CASE for money had and received to the plaintiff's use. The case was, the plaintiff paid money on a promise to transfer stock at a future day, which not being done the plaintiff brought this action. At the trial the doubt was, whether the plaintiff had brought a proper action, because at the time this money was paid, the plaintiff never intended to have it again; and the promise to transfer the stock was a sufficient consideration for his parting with the money. The Chief Justice directed, the court should be moved; and they were all of opinion, that the action was well brought; not for the whole money paid, but the damages in not transferring the stock at that time, which was a loss to the plaintiff, and an advantage to the defendant, who was receiver of the difference money to the use of the plaintiff.

Hawkins vers. Perkins.

At Guildhall coram Pratt C. J.

Where bail are obliged to give evidence, and where not.

CASE upon a note. The plaintiff called one of the defendant's bail to prove the hand; and whether he was bound to give evidence was the question. The Chief Justice said, if he was a subscribing witness, he would oblige him; but otherwise he would leave him to his liberty.

Anonymous.

Coram King C. J. at Guildhall.

A Man paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. Upon this the other brings his action for the money, as so much money had and received to his use. And the Chief Justice held, it well lay, because the thing contracted for was not delivered: he said it would have been otherwise, if the thing contracted for had been delivered, though to a less value.

Where money is paid and the thing contracted for not delivered, it is money received to his use.

Anonymous. In Canc.

A. Makes his will, and devises 300 l. to his daughter, provided she married with the consent of her mother, otherwise only 200 l. After this in his own life he marries her and gave 200 l. with her. And this was held a revocation of the devise, so as to deprive her of the other 100 l.

Marriage portion a revocation of a devise.

Rex *vers.* Major' et Jurat' de Dover.

MANDAMUS *teste* 14th of November, returnable 28th, was moved to be superseded, for want of fifteen days between the *teste* and return: upon this the practice was inquired into, and agreed to be, and settled accordingly, that where the party lives forty miles from London, there must be fourteen days, otherwise only eight days, and that one is to be taken inclusive and the other exclusive; so that a writ *teste* 14th may be returnable the 28th.

How many days there ought to be between the *teste* and return of a mandamus. Vide Salk.

that Case was produced, and it appeared to be fourteen and not fifteen, as expressed in the report. It had indeed the words *ad minus*, but yet held, one should be inclusive and the other exclusive.

434, *contra*, but the rule of

Williams *vers.* Fowler.

Mich. 6 Geo. rot. 113.

ERROR of a judgment in C. B. in an action upon the case against the defendant as administrator of J. S. for work and labour done in the intestate's time: the defendant pleads, that the intestate in his life was indebted to A. B. in 21 l. for goods sold and delivered,

Executor may plead an erroneous judgment. Lill. Ent. 253.

delivered, and neglecting to pay in his life, the said *A. B. Michaelmas* 5 Geo. impleaded the defendant as administrator *in placito debiti super mutuat*, *taliterque processum fuit*, that judgment was given for the plaintiff. Then he pleads another judgment for a debt of the same nature, and recovered in the same manner; and a third which was for money lent; and a fourth like the two first. Then he avers that all these were for good and just debts, and that he has administered all the goods to 100 s. which are liable to these judgments. And hath not assets *ultra*.

Demurrer inde et jud' pro defendente, after two solemn arguments in *C. B. ubi intratur*, *Hil. 5 Geo. rot.* 1587. and error brought in this court.

Reeve pro quer'. Though the debts are averred to be true, yet being recovered in improper actions, they can be no bar to us. The debts are still subsisting as debts upon simple contract, and so are not pleadable to us. The administrator if he should be sued in an action for goods sold and delivered, could never plead these judgments (which are in actions of debt) in bar. In 1 *Ven.* 198. *assumpsit* against an executor, he pleads four judgments, one whereof was in an action of debt for a principal sum and interest borrowed by the testator; and on demurrer it was adjudged for the plaintiff, because no action of debt lay for interest: and though the defendant had not taken advantage of it by plea, it was said no admission of his could prejudice the other creditors. In the present case, if the defendant had made a proper defence, the plaintiffs could never have recovered in those actions.

Wearg contra. That phrase *placitum debiti sur mutuat*, is not confined to money lent only, as *placitum debiti* generally is; for that is the known description of an action of debt, but this is not. When I deliver goods and am not paid, I may properly be said to be a lender of the money which I trust. Suppose the seller lends the buyer the money with one hand, and receives it with the other; surely that will not deprive him of his action for money lent. It may be there were in the declarations proper counts added to reach these demands.

But if *mutuat* be inconsistent, you will reject it, as you do an inconsistent *postea* under a *scilicet*. In this case we have done more than we needed, for there was no occasion to aver the recovery *pro vero et justo debito*, or even to have shewn how it accrued. 1 *Lew.* 200. *Lutw.* 662. The plaintiff might have replied, there was nothing due, and was not driven to his demurrer. *Jones* Sir *William* 91, 92. The case in *Ven.* is not at all applicable, for there

there was no debt which would be a lien upon the executor, but here there is a real debt.

One of these judgments is out of the exception, the debt being for money lent, and properly recovered, and that covers all the assents, and destroys the plaintiff's action; for he must avoid so many of the judgments, as that it will appear there are assents, according to the case of *Dee v. Edgewomb* in *Vaugh.* But here according to his own reckoning he has avoided but three, and the fourth, which is for more than the assents, remains unimpeached.

It was argued a second time by Serjeant *Comyns* for the plaintiff, and Serjeant *Miller* for the defendant.

Serjeant *Comyns*. On a special *plene administravit* (as this is) the executor must bar us by good judgments, and not by such as are erroneous. 8 Co. 133. 3 Lev. 141. 9 Co. 108, 110. b. Salk. 312. Indeed it is otherwise in cases where the administrator might have pleaded it in abatement, but this is not a matter avoidable by plea, it appearing upon the face of the record. An action of debt it is true will lie upon an executory promise, but then the party must declare according to the truth.

Suppose in an action for money lent the parties had gone to issue, and on the trial it had appeared, that the same demand was the price of goods sold and delivered, no doubt but in that case the plaintiff would have been nonsuit: and here it will be the same thing, since that which would have turned him round upon the evidence, appears now upon the record.

There may be a great deal of fraud in allowing this practice, for these judgments are entered up immediately, *pendente lite* of another person, when if they were to go on in the ordinary way by writ of inquiry, that other person perhaps might have got judgment first. And if these judgments are erroneous, then the executor has the benefit of them in covering so much assents, and may get rid of them afterwards, when he has served his turn.

Serjeant *Miller contra*. This is at most but an improper action, and the whole record not being set forth, you will intend there was another count proper to take in the demand. In these cases the true point is, whether there be a just debt or not. *Lutw.* 662. 1 Sid. 230. 1 Keb. 808. *Vaugh.* 94. 1 Sid. 333. An erroneous judgment is pleadable, till reversed. *Cro. El.* 471. Sir *W. Jones* 91.

C. J. Both sides have gone upon begging a question, for which I think there is no foundation; which is, that these judgments are erroneous. For consider, though the recital of them is, that the defendant was indebted for goods, and impleaded in a *mutuatus*, yet that is more than will appear upon the record of those judgments, which are only common *mutuatus*'s. The most that the special setting them out amounts to is, to shew there was a precedent debt, and that the judgments were not fraudulent; and this is more than the pleader needed have done, for he might have relied upon it, that there were such judgments, without shewing the consideration of them, the want of which should come of the other side, and be taken advantage of in an issue upon the fraud. Here the executor has done more than he was obliged to do; he has shewn that there were such judgments, and lest you should think these were demands set up on purpose to cover the assets, he tells you further that there was a fair and honest debt recovered by them. I think the judgment ought to be affirmed. To which *Powys* and *Fortescue* Justices agreed. *Et per Eyre J.* There is no inconvenience in letting executors confess judgments, for if there be a precedent debt, all is fair; if none, the party will have them upon the fraud. I think this a good judgment; though if it were erroneous, it might be a bar, for all we have to look to is to see it is not fraudulent. Where *interest* is damages, debt will not lie, but it is otherwise where a stated interest is fixed at a stated rate. The judgment of C. B. was affirmed.

Hilary

Hilary Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt.* Lord Chief Justice.

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

Sir Robert Raymond, *Knt.* Attorney General.

Sir Philip Yorke, *Knt.* Solicitor General.

} Justices.

Dominus Rex *vers.* Inhabitantes de Bicham.

THE sessions setting out the fact specially, adjudge the settlement of a poor person to be at *Bicham*, because when he lived in that parish he executed the office of collector of the duties given by the 6 & 7 *W. 3. c. 6.* on births and burials.

Executing the office of collector of the duties on births and burials, gives a settlement.

Serjeant *Darnall* moved to quash it, because this was not a parish office, and it would be giving the commissioners (who are to appoint the collectors) a power to bring what charge they would upon the parish: besides, it was not stated in the order, that this was an annual office, as it must be to give a settlement within the express words of 3 & 4 *W. & M. c. 11.*

Reeve contra, cited the case, *Hil. 9 Ann. between the parishes of St. Mary and St. Lawrence in Reading*, where it was held that the execution of the office of warden over all the parishes in the town of *Reading* (which office was in the nature of that of a tithingman) gave him a settlement in that parish where he lived.

Et

It need not
be a *parish* of-
fice but an an-
nual office in
the parish.

Et per curiam, The reason why the executing offices gives a settlement without notice is, because of the notoriety of the thing, of which the Parliament thought it impossible but the parish should have notice: can any thing be more notorious than this, which is to collect a duty from house to house? We cannot suppose a fraud in the commissioners, that they would appoint a person of no substance to be collector, only to bring a charge upon the parish. It needs not be a parish office, but a publick annual office in the parish. And as to its not being said that this man executed it for a year, we must take it he did so, because it appears on looking into the statute that the power given the commissioners is to appoint a person who shall be collector of the duties for a year, and then give in his accounts. It has been held a settlement in the case of the land-tax, and why not in this? The order was confirmed.

Shepherd *vers.* Shorthose.

Mich. 7 Geo. rot. 83.

If the probate
be lost, the
executor may
declare on an
exemplifica-
tion of it.

CASE by the executors of the assignee of commissioners of bankrupt for goods sold and delivered by the bankrupt: the defendant prays *oyer* of the letters testamentary, which are set out, and then demurs. And *Strange* for the defendant objected, that the declaration was of *Trinity* term, when the executor says that he brings into court the letters testamentary, by which, says he, *satis liquet* to the court that I am executor of the will, *et inde habere execution'*, &c. Whereas upon *oyer* it appears that the instrument produced under seal of the ordinary does not bear date till *November* following, so the objection is, that the executor declares before probate, contrary to all the cases, where it is held that though he may commence an action, yet he cannot declare in it before probate.

To state the objection fairly, I do admit, that the letters of the ordinary, which are set out, do recite that 13 *January* 1718. the will was exhibited, *probatum et approbatum*, which is before the action; but this is not sufficient, for though the will was exhibited, and though evidence was given to satisfy the judge of the execution of it, yet that is what this court can take no notice of, but only the act of the spiritual court, that commits the execution of the will. 9 *Co. Hensloe's* case is express, that the testament must be shewn duly proved under the seal of the ordinary; and in the case of *Clark v. Clark* in *B. R. Hil. 1 Geo.* it was laid down by the present Lord Chancellor, who delivered the resolution of the court, that the producing *litteras testamentarias* was sufficient, because they imported

imported the will, with that further circumstance of its being under seal of the ordinary; for unless they were so under seal, it could not *satis liquere* to the court, that he was executor.

Sed per curiam: The instrument here produced is not the probate, but an exemplification of it; and that shewing there was a probate before the action, is sufficient: this is their constant way, when the probate is lost, for they never grant a second probate, only exemplify the first, and those exemplifications have been allowed to be given in evidence. The plaintiff had judgment.

Dominus Rex *vers.* Buckland.

THE court was moved to deprive one in custody on an *excommunicato capiendo* of the benefit of the rules; but on consideration and search for precedents they refused to do it.

One in custody on *excommunicato capiendo* is to have the benefit of the rules.

Anonymous.

THE mortgagee after the day of payment brought an ejectment, and the court ordered him to shew cause, why on payment to the lessor, or bringing into court, principal, interest and costs, proceedings should not be stayed: and *Denton*, who moved it, said, it was done often in *C. B.*

Dominus Rex *vers.* Newton et al'.

BY the statute 1 Geo. c. 13. §. 11. it is enacted, that any two justices of peace may summon any person to take the oaths before them; and if they do not appear, then on oath of serving such summons, the justices are to certify the same to the quarter sessions, where if the party so summoned does not appear to take the oaths, he shall stand convicted of recusancy. The defendants were justices of the peace, and issued their summons accordingly; but coming afterwards to understand, the party was a gentleman of fashion, and not suspected to be against the government; lest a transaction of this nature should be an imputation upon him, they refused to give the prosecutor his oath of the service of such summons, that the matter might go no further. And now upon motion against them for an information, the court declared, that the justices had no discretionary power to refuse to put the act in execution, and therefore granted an information against them.

Justices of peace have no discretionary power as to tendering the oaths, when application is made.

Wiar *vers.* Smith.

Defendant's attorney ordered to give plaintiff copy of proceedings lost.

THE plaintiff's attorney sent the issue-book to the defendant's, who accepted it and paid for it; but the plaintiff not going on to trial, the other side gave him a rule to enter his issue, in order to carry down the cause by proviso. And upon an affidavit that the plaintiff's attorney had mislaid the papers, the court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to comply with the rule.

Dunsley *vers.* Westbrowne.

At Guildhall coram Pratt C. J. de B. R.

Where the master brings trespass *per quod servitium amisit*, the servant beaten is no witness.

Sailor no witness in action by another for wages, where the question turns upon the loss of the ship.

TRESPASS for beating his servants, *per quod servitium amisit*; the plaintiff called one of the servants to prove the case. I objected, that he having a right to bring an action in his own name, it was in effect swearing for himself, and he must be under a byass, because what he says now upon his oath, may be given in evidence against him in his own action. The Chief Justice inclined to the objection, so the plaintiff set him aside; and in the debate of it the Chief Justice put this case. A sailor sues for wages, and the question turns upon the loss of the ship: no sailor who has wages due, shall be a witness as to the salvage of the ship, because he is concerned in the event of that question.

Anonymous.

Coram Pratt C. J. at Guildhall.

If the first contract with warranty be broke off, the warranty will not extend to a subsequent sale.

THE defendant came to the plaintiff, who was a sword-cutler, to sell him a second-hand sword: and upon his warranting it to be a silver hilt, the plaintiff offered him a guinea and half for it; the defendant refused to take the money, and thereupon went to several other sword-cutlers, but not meeting with any that would give so much as the plaintiff, he came back to him, and told him he should have it for the price he offered: the plaintiff upon that, thinking to have it cheaper, refused to give the guinea and half, and at last beat down the price to 28 s. which was paid the defendant for the sword. Afterwards the plaintiff found that the gripe of it only was silver, and the rest of the hilt was brass; upon which he brings his action against the defendant, and declares upon the warranty of the hilt's

hilt's being silver, when in fact it was brass: but not being able to prove a warranty upon the second bargain, he was nonsuit: the Chief Justice being of opinion, that the warranty upon the bidding a guinea and half would not extend to this sale, which was a new and a different contract at a different time. Also he seemed to be of opinion, that the gripe being silver, the plaintiff should have declared specially on a warranty of the rest of the hilt only; and have said that that part was brass.

Smith *vers.* Potter. B. R.

IN a *qui tam* on 5 Eliz. for exercising a trade without an apprenticeship, *Strange* moved to stay the proceedings, because the nominal plaintiff had released, and the fact was laid at *Cambridge*, whereas the jurisdiction of B. R. is at last settled to be restrained by the 21 Jac. 1. c. 4. to actions arising in the county where B. R. fits, so that if they were to go on to trial, the plaintiff could have no effect of his suit. And of this opinion was the court, and they made a rule that proceedings should be stayed.

Proceedings in a popular action stayed, *quia* brought in B. R. and the fact arose at Cambridge. Salk. 373.

Moore *vers.* Warren, coram Pratt, }
Holme *vers.* Barry, coram King, } at Guildhall.

THE defendant in each of these actions at two of the clock in the afternoon gave the plaintiffs goldsmiths notes in payment, which were tendered the next morning at nine, when the goldsmiths had a quarter of an hour before stopt payment. The Chief Justices directed the juries, that the loss should fall on the defendants, there being no laches in the plaintiffs, who had demanded their money as soon as was usual in the course of dealing, and that the keeping the notes till the next morning could not be construed a giving new credit to the goldsmiths. And both juries found accordingly. And afterwards between

If the party who receives a goldsmith's bill tenders it the next day, it is not his loss if the goldsmith fails. Salk. 442.

Turner et al' *vers.* Mead et al'.

Coram Pratt, at Guildhall.

And the common usage in transacting affairs of this nature is to be chiefly regarded.

THE defendant paid the plaintiffs, who were the sword-blade company, two goldsmiths notes at three in the afternoon; the plaintiffs servant the next morning leaves the notes with the goldsmiths in order to have the money ready for him as he came back a clearing; it being as they proved customary for the bank and the sword-blade company to send out their notes in the morning, and then call for the money as their servant returned in the evening; and the goldsmiths upon receiving the notes always cancelled them, and got the money told out against the time it was usually called for. The notes in this case were brought early in the morning, and received, and cancelled: and between four and five in the afternoon the servant that left them called again for the money, when the goldsmiths had just stopt payment: upon which the servant takes new notes of the same tenor and date with the cancelled ones he left in the morning. And because the plaintiffs had done nothing but what was usual, in leaving the notes instead of taking the money when he first called in the morning, the Chief Justice directed the jury to find for the plaintiffs, which they did.

Dominus Rex *vers.* Hall. Ibidem.

What confession of being author of a libel is sufficient to read it.

IN an information for a libel against the doctrine of the Trinity, the witness for the crown, who produced the libel, swore that it was shewn to the defendant, who owned himself the author of that book, errors of the press and some small variations excepted. The counsel for the defendant objected, that this evidence would not intitle Mr. Attorney to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But the Chief Justice allowed it to be read, saying he would put it upon the defendant to shew that there were material variances.

Purret *vers.* Weeks.

At Taunton assizes, coram Price, un' Baron' Scaccarii.

THE plaintiff was an exciseman, and lived in the county of *Devon*, and executed his office in several parishes in that county, and also in a parish that extended into *Somersetshire*. And the commissioners of that county, apprehending they had a concurrent power with the commissioners of *Devon* to tax him for his salary, on account that he executed his office in their county, they tax him accordingly, and for want of payment distrain. For which trespass was brought; and ruled, that it well lay, for though he rides about to the publick houses in that county, yet he must be said to keep his office in the town where he lives and has his books, and there he was only taxable.

Exciseman to be taxed in the county where he lives.

Leeds *vers.* Power.

ERROR *tam in redditione judicii* in an ejectment in *C. B.* in *Ireland*, *quam in affirmatione ejusdem in B. R.* there.

How to compel an assignment of errors on writs from *Ireland*.

The beginning of the term I moved for the common rule, that the plaintiff should assign his errors, it not being usual to take out a *scire facias* as we do on writs of error from *C. B.* When that rule was out, I moved again, upon an affidavit that we could find no body concerned for the plaintiff in error, and had fixed it up in the office; that therefore we might be at liberty to sign a *non pros*, else if we should be put to send the rule over to *Ireland* to be served, the delay would be as great as in the case of a *scire facias*, and it being a writ of the plaintiff's own suing out, he must be apprized when was the due time to come in and prosecute it. Whereupon the court made a new rule, that unless errors were assigned within four days after fixing a new note up in the office, the defendant in error should be at liberty to sign a *non pros*.

Hill. 8 Geo. Huxley v. Burton, in an Irish writ of error I had the same rules. Hill. 11 Geo. Waters v. Ballantine, I had the same rules on my motion.

Within the time errors were assigned; and on the arguing *Reeve* objected, that it is an ejectment for lands in the county of *Dublin*, and yet the trial is at the King's courts in the county of the city of *Dublin*.

Strange contra. This court will not take notice that they are distinct counties, but rather intend the city to be part of the county. That the county of the city of *Dublin* is the county in which the city of *Dublin* lies. Or if they should, yet the trial may be right, for it runs *postea die et loco infra content'*, which *locus infra contentus* may be as well the place within the county of *Dublin*, where the demise is laid to be made, as any other.

Or admitting it a trial out of the proper county, yet it is helped by the 16 & 17 Car. 2. c. 8. which is enacted in *Ireland* by 17 & 18 Car. 2. c. 12. being a trial by a jury of the proper county, for the award of the *venire* is previous to any mention of the county of the city, and commands the sheriff of the county, to summon twelve men of his county, and then the trial is had by the *juratores unde infra fit mentio*.

If this be not right, there never was a proper trial of any cause arising in the county of *Dublin*; for the King's courts sitting in the city of *Dublin*, it is there all the trials of those causes are had: just as here, where causes of *Middlesex* are tried in the same place where the King's Bench sits. We have instances in *England* of county causes being tried in cities which are counties also, as at *Worcester* where both are tried in the same place.

The court said, they must intend them distinct counties, but as to the other points they went over to be inquired into. And afterwards,

In answer to the objection made the last term, that the lands lay in the county of *Dublin*, and the trial was in the county of the city of *Dublin*; *Strange* now cited an act of Parliament made in *Ireland* 17 & 18 Car. 2. c. 20. which appoints the trial of causes arising in the county of *Dublin* to be at *nisi prius* in the same place where the King's courts sit, in the county of the city of *Dublin*. So the judgment was affirmed.

Carth. 448.

N. B. There being such an express act of Parliament, I thought it not necessary, to put it on the former foot of being a trial by a jury of the proper county, which would have been a sufficient answer: for *Pasch. 10 W. 3. B. R. Lady Calverly v. Sir Richard Leving* in covenant, the case was sent into the county palatine of *Chester*, on a local plea of a matter arising in the county of the city of *Chester*: the *mittimus* to the C. J. was, to award a *venire* to the sheriff of the county of *Chester*, which was done accordingly; and after verdict *pro quer'* moved by Sir *Barth. Shower* in arrest of judgment, that this is a mistrial, not aided by the statute of jeofails; being a trial in a wrong county: but the court held it was aided: and that is a stronger case than this, where it appears the trial was by a jury of the proper county, as it was not in that case; and in delivering the resolution of the court *Holt C. J.* cited *Chew v. Brigs* in *B. R.* where he said it had been so held likewise, and so is 1 *Saund. 246. Craft v. Boite*.

Easter Term

7 Georgii Regis. In B. R.

Sir John Pratt, *Knt.* Lord Chief Justice.

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt.* Attorney General.

Sir Philip Yorke, *Knt.* Solicitor General.

Myer *vers.* Arthur.

THE plaintiff recovered judgment against the principal, and took out a *capias ad satisfaciendum*, and had a *non est inventus* returned: of this judgment error is brought, and two days after the plaintiff sues out a *scire facias* against the bail, who now moved to stay the proceedings upon the *scire facias*, as is done in cases where pending error the plaintiff brings an action of debt upon the judgment; insisting that it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves, by a surrender of the principal, which they can do at any time before the return of the second *scire facias*. And the court thought it reasonable, that the proceedings should be stayed, on the bail's consenting, that if the judgment be affirmed, they would surrender the principal, or give judgment on the *scire facias*.

Proceedings
against bail
stayed pend-
ing error by
the principal.

*Trin. 10 Geo.
Tucker v.
Waller, the
same rule up-
on my mo-
tion.*

Cutler *vers.* Goodwin.

Where the plaintiff releases part of the damages, he need not release any of the costs given by the jury.

ERROR of a judgment in C. B. in case upon several promises; on the inquiry damages are given separately, *et pro missis et custagiis ad viginti solidos*, and then the plaintiff releases the damages as to two of the counts, and has judgment for the residue with costs *de incremento*.

Branthwayte Serjeant objected, that the 20 s. costs given by the jury went to the whole, whereas by the release the plaintiff confesses he has a cause of action but as to part. *Hob. 168. Sed per curiam*, All the precedents are so, the jury give the same costs in all cases, and if the defendant is put to any particular expence as to the bad count, the court can make him an allowance in the costs they give *de incremento*. Judgment affirmed.

Bayly *vers.* Raby et al'.

The court cannot join declarations against separate persons.

FAZAKERLEY moved, that four several declarations in trespass against four different persons might be put into one, on an affidavit that the trespass, if any, was committed by all jointly. *Sed per curiam*, We never went so far as the case of different persons, but only where the declarations are between the same parties. The plaintiff may have the benefit of the other's evidence in his action against either, but this will be to deprive him of that.

Noaks *vers.* Watts.

How pauper shall be punished for not going on to trial.

PER *curiam*, It is settled in C. B. and we rule it so here, that a pauper shall not pay costs for not going on to trial, as other plaintiffs do. But if the costs are taxed, we will prevent his being vexatious, by obliging him to pay them, before he shall try the cause.

Dominus Rex *vers.* Revel.

You are a rogue and a liar, spoke of a justice of peace, indictable.

INDICTMENT against the defendant for saying of Sir Edward Lawrence a justice of peace, in the execution of his office, You are a rogue and a liar. And *Wearg* moved after verdict *pro rege*, in arrest of judgment, that though the justice might have committed him for the contempt, yet the words are not indictable, since

since it is not to be presumed they would provoke a justice of peace to a breach of the peace, which is the reason why indictments have been held to lie for words. *Sed per curiam*, The allowing he might be committed, shews they were indictable. It is true the justice may make himself judge, and punish him immediately; but still if he thinks proper to proceed less summarily by way of indictment, he may: the true distinction is, that where the words are spoke in the presence of the justice, there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. Cases cited, *Salk.* 698. 3 *Mod.* 139. 2 *Show.* 207. 1 *Roll. Rep.* 79. *Regina v. Langley, Soley, Nuns and Legasseck.* Judgment *pro rege.*

Sanderfon *vers.* Clagget.

LIBEL in the spiritual court by the archdeacon, for procurations; the defendant who was curate, suggests that they have never been paid, and that the church for which they are demanded is a rectory impropriate without a vicarage endowed. And having obtained a rule to shew cause, why there should not go a prohibition; Mr. *Williams* for the archdeacon produced an affidavit, that 6 s. 8 d. had been constantly paid every year, and cited *Davis* 6. where it is said, that the visitor has the same right to procurations, as the parson has to tithes; for as one instructs the laity, so the other instructs the parson as to the points of his duty; and that a clergyman can no more prescribe not to pay procurations, than a layman can prescribe in a *non decimando* for tithes. *Et per curiam*, That is certainly so; of common right procurations are due to the ordinary or archdeacon, and here the ordinary suffering the archdeacon to sue for them before him, we must take it they belong in this case to the archdeacon; which is made more reasonable by coupling it with the evidence of payment. Formerly the visitor demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty, and examine the state of the church; afterwards these were turned into annual payments of a certain sum, which is called a procuration, being so much given to the visitor *ad procurandum cibum et potum*. Though there be no vicar endowed, yet the reason for these payments continues, for the impropriator is obliged to find a curate, and that curate will have as much instruction from the archdeacon, as if he was rector of the parish, or a vicar endowed.

Suit lies in the spiritual court for procurations. 1 Will. Rep. 657.

And as this is a mere ecclesiastical right, the suit is properly instituted before the ordinary. It was never known, that an action was brought for these procurations, nor in the case of tithes are there any instances before the statute of *Edw.* 6.

It was objected, that the libel runs, That time out of mind the archdeacon had this right, and yet it appears the archdeaconry was made within time of memory, and this is to let the spiritual court try a prescription. *Sed per curiam*, We all know what they mean by the phrase *time out of mind*, which with them goes no farther back than fifty or sixty years. But if it were a new archdeaconry, why is it not like a new rectory, where tithes are due as before for all the lands within the district. Here the demand is spiritual, and so are the persons, who are bound by the canon law; which being the rule of these payments, we are of opinion, that the suit below was well instituted, and therefore there ought to be no prohibition.

It was formerly denied in Chancery by the Master of the Rolls, on debate, and time to advise.

Hillier *vers.* Plympton.

Hil. 7 Geo. rot. 46.

Departure.

ACTION upon the case upon several promises; the defendant pleads infancy, the plaintiff replies, it was for necessities, and the defendant rejoins an account stated, *quodque superinde praed querens exoneravit* the defendant. And on demurrer judgment was given for the plaintiff, because the rejoinder was a departure from the plea; or if not, yet *exoneravit* generally will not do, for the party must shew how he was discharged.

He that pleads
exoneravit,
must shew
how.

Onslow *vers.* Orchard.

Where the
defendants
confess the
trespass, the
damages can-
not be sever-
ed.

TRESPASS against two, and judgment by default, and separate damages, 20 *l.* as to one, and 1 *d.* as to the other; and stayed till further motion, on the authority of *Heydon's* case, that the damages cannot be severed, where the trespass is confessed. *Trin. sequen'* the judgment was arrested. 11 *Co.* 5.

The Mayor of Northampton's case.

Libel.

HE sent Lord *Halifax* a licence to keep a publick house, which the court said was a libel in the case of a person of his quality, and granted an information for it.

Anonymous.

PER curiam, If a man escapes, and returns again, and after ^{Escape purged by return.} commits a second escape, he cannot be taken up for the first escape, it being purged by his return.

Dominus Rex *vers.* Inhabitantes de Islip in com' Oxon.

UPON a special order of sessions, the case was stated for the ^{Sickness or absence of servant for part of the time does not prevent the settlement.} opinion of the court. That *Henry Wilson* was regularly hired for a year by *Samuel Jones* into the parish of *Islip*; that during the year he was sick for six days, and incapable of doing any service; that afterwards he went without leave of his master to see his mother, and staid away four days; and that three days before his year was up he asked leave of his master to go to a statute fair, to be hired, which the master refused, but the servant persisting he must go, the master replied, I am resolved you shall gain no settlement in this parish, and therefore if you will go, it shall be for good and all. No, says the other, I will serve out the year, and thereupon he went, and never returned during the last three days; and when he came to be paid, the master deducted for the time he was sick, and when he went to see his mother, which deductions the servant agreed to, and the master at the same time abated 6 *d.* for the last three days, which the servant refused to allow, but the master refusing to pay it, the servant took the rest of his wages. And whether these interruptions of the service should defeat the settlement in *Islip*, was the question; and the sessions adjudged it a settlement.

It was argued largely by Mr. *Hawkins*, who moved to quash the order; and he cited the case *between the parishes of Pawlet and Bernham, Mich. 1 Geo.* where the master and servant parted by consent three weeks before the end of the year, and it was held no settlement.

And now *Pratt C. J.* delivered the opinion of the court.

In this case here is no doubt but that there was a compleat and perfect hiring for a year. The only question is, whether there has been such a service in pursuance of it, as will give a settlement to the party. Three objections have been made at the bar, which it will be proper to take notice of.

I. That

1. That the servant being sick for six days, and incapable of serving, can never gain a settlement, which is to be acquired only by a service for a year; but here say they, he did not serve for six days, and so there wants so much of a service for a year. This was lightly touched upon at the bar, and surely there is little in it; a servant that lies thus under the visitation of the hand of God, which befalls him not through his own default, is and must be taken to be all the while in the service of his master; and if this exception was to be allowed, it might prevent all the settlements in the kingdom: it is not to be presumed, that the servant is less able to provide for himself at the year's end, because he has had a slight indisposition during the year; and that presumption of an ability is the foundation of making it a settlement.

2. It was objected that his going to see his mother without leave was a desertion of the service, and the time he staid away takes so much off from a compleat service for a year. As to that we are all of opinion, that it will not prevent the settlement; it was never the intent of the statute, that if a servant happened to stay out a night or two, it should avoid the settlement; but here the master taking him again, has dispensed with his non-attendance, so there is nothing in that objection.

3. The Third and indeed the most considerable objection was, that the going away three days before the year was up, and never returning again during the year, is a forfeiture of the settlement.

Now though that would *prima facie* be a good objection, yet as this case is circumstanced, we are of opinion it cannot prevail. Consider how the case stands with regard to the servant. He knew his master designed to part with him at the year's end, and therefore it was high time for him to look out for another place. To this end he applies in a very proper manner for leave to go to the statute fair, which is a place where in all likelihood he might provide himself, and not be obliged to lie idle all the year, it being usual for people in the country to go thither to hire their servants; the master like an unreasonable man refuses so reasonable a request, coupling it with a declaration, that the servant should gain no settlement with him, which is a badge of fraud on the side of the master that ought not to prevail; as therefore the request was reasonable, and upon a just ground on the side of the servant, and the refusal unreasonable on the side of the master, we think the servant's going afterwards without leave is no forfeiture of his former service, especially if we take in the declaration the servant made at that time, that he would serve out the year, and his refusal afterwards

wards to allow the master 6 *d.* for the last three days, which plainly shew that the contract was not dissolved before the end of the year, as was strongly insisted on at the bar.

These are all the exceptions that were taken to this order; we are all of opinion, that they are not sufficient to overthrow the settlement, and consequently the sessions have done right in sending him to *I/kp*, and the order must be confirmed.

Woodford *vers.* Eades et al'.

ON a contract for stock between the plaintiff and *J. S.* they each deposit 200*l.* in the hands of the defendant, and *J. S.* not performing his agreement, the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without consent of both parties, gave 1 *d.* damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages did not extend to this case, where the jury mistook in point of law; and the Chief Justice said he knew no reason why the court should not interpose in the other case.

Court set aside verdict for smallness of damages.

Vide Salk. 647.

Clare *vers.* Frost.

TRESPASS for cutting down the plaintiff's tree. *Strange* moved, and had leave to plead double; *viz.* that the defendant was lessee of an house and the close where the tree stood, and having liberty to cut down for repairs, he felled it on that account; and secondly, That *J. S.* was owner of an antient mill, to which there was a watercourse through the ground of the plaintiff, and so prescribe for a right to enter and cleanse the watercourse, and that the tree hung over, and the root spread so into the stream, that it stopped the water, and so justify the cutting down.

Two justifications allowed to be pleaded.

Edwards *vers.* Blunt.

P E R curiam, After judgment on demurrer, the defendant shall not come to arrest the judgment on return of the inquiry, for an exception that might have been taken on arguing the demurrer. The parties cannot be said to come as *amici cur'*, nor shall any body tell us, that the judgment we gave on mature deliberation is wrong; it is otherwise indeed in the case of judgment by default, for that is

After judgment on demurrer, no motion to arrest judgment.

not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for there the party could not allege it before. *How v. Godfrey, Mich. 4 Geo. 2.*

Seagood vers. Neale. In Canc.

What writing
evidence of
agreement
within the
statute of
frauds.

S. Agreed to sell an estate in land to *O.* and wrote to his agent to deliver the title deeds to *O.* he having agreed to dispose of it to him. Afterwards *S.* sold this estate to *D.* who had notice of this transaction: *O.* brought a bill against *S.* and *D.* insisting that the letter brought the case out of the statute of frauds and perjuries. But Lord Chancellor held it did not, because the agreement does not appear in it.

Cumber vers. Wane.

Trin. 5 Geo. rot. 173.

Giving a note
for 5 l. cannot
be pleaded as
a satisfaction
for 15 l.

ERROR e C. B. in an *indebitatus assumpsit* for 15 l. The defendant pleads, that he gave the plaintiff a promissory note for 5 l. in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5 l. could not be a satisfaction for 15 l. and that where one contract is to be pleaded in satisfaction of another, it ought to be a contract of an higher nature. *Hob. 68. 2 Keb. 804.* One bond cannot be pleaded in satisfaction of another. *1 Mod. 225. 2 Keb. 851.* Even the actual payment of 5 l. would not do, because it is a less sum. *5 Co. 117. 1 Leon. 19.* Much less shall a note payable at a future day.

Econtra. It was argued, that the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and to have the security for it made negotiable. A stated account may be pleaded in bar of an action of covenant. *4 Mod. 43. 1 Mod. 261. 1 Roll. Abr. 122.* Formerly indeed executory promises were not held a satisfaction, but the contrary has been since adjudged. *Raym. 450. Salk. 76.* And now it is held that an award before performance is a bar of the former action.

Et per Pratt C. J. (on consideration) We are all of opinion, that the plea is not good, and therefore the judgment must be affirmed: as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement

agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case. If 5 *l.* be (as is admitted) no satisfaction for 15 *l.* why is a simple contract to pay 5 *l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortning the time of payment. Nay in all instances the bettering his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction. 1 *Brownl.* 47, 71. 2 *Roll. Abr.* 470. The judgment therefore must be affirmed.

Then it was alleged, that since the time which the court took to advise, the defendant in error was dead; and therefore they prayed, that they might enter the judgment *nunc pro tunc*, as was done in the case of *Baller v. Delander*, *Trin. 1 Geo. in B. R.* which was ordered accordingly. Judgment entered *nunc pro tunc* where the party died pending a *cur' advisare vult.*

Right *vers.* Hamond.

IN ejectment, a case was made at *Kent* assizes; that *Thomas Came*, being tenant for life of the lands in question, remainder to his wife for life, remainder to his own right heirs, 20 October 1673. made his will in these words: "Item, my lands by *Woolwich* my wife is to enjoy for her life, after her decease of right it goeth to my daughter *Elizabeth* for ever, provided she hath heirs; if my said daughter *Elizabeth* should die before her mother, or without heirs, and my said wife *Mary* should marry again and have an heir male, I bequeath him all my right to that estate, not thinking I can sufficiently reward her love; if my said wife marrieth again, and fails of heir male, after her decease and my daughter, the failing of heirs, I bequeath 50 *l. per ann.* of that estate to my brother *Joseph Came*, and to his heirs for ever." And then distributed the rest to other persons. Construction of a devise.

The devisor died, and the wife married again, and had issue *Thomas Hamond* the defendant, and died. Then *Elizabeth* the daughter died without issue. And upon her death the lessors of the plaintiff claim the estate as right heirs of the devisor, and the defendant claims under the devise to the heir male of the devisor's wife by a second husband.

Reeve pro quer' argued, that the devise to the defendant was void, being of a fee upon a fee. 19 *H. 8.* 8. *Cro. Cro.* 57. For when it was to go to his daughter and her heirs, there could be no limitation over;

over. Indeed 3 *Lev.* 70. says it is but a tail; but the difference is, where the limitation is to one who can be heir to the daughter, there it is a fee-tail, because the devisor must know the remainder would be void if the first was a fee-simple, because the remainder-man would claim as heir to the daughter; but here the defendant is a stranger, and cannot be heir to the daughter.

Then it is objected, that the words *she failing of heirs*, shew what heirs were meant, and there is a limitation to the uncle, who may be heir to the daughter. But why may not that be construed to be a rent-charge of 50 *l. per ann.* to the brother, and then it can have no influence to turn the daughter's estate into a tail; besides, this is an independent clause, and therefore not to controul the construction of the former, according to the case in *Dy.* 124.

The defendant cannot take by way of executory devise, because it is a contingency on a dying without heir, which is too remote.

But if the devise was good, yet the contingencies have never happened. The words are, *if my daughter dies before her mother, or without heirs*: now the words are not to be taken strictly, for then perhaps the issue of the daughter may be barred by her death before the mother; but the natural way is, to read it in the copulative, as we have many instances. 1 *Ven.* 62. 1 *Leon.* 70. *Pollex.* 645. *Plow.* 286, 289. So that taking it that way, then the mother died first, and consequently the defendant who is to claim on the daughter's dying before the mother, can have no title.

Cheskyre Serjeant contra. I admit, if the first words stood alone, they would carry a fee to the daughter. But it would be endless to cite cases, where the fullest words have been controuled by what has come after, so as to make that a devise in tail, which otherwise would pass a fee. 1 *Roll. Abr.* 836.

I do not contend, that this is an executory devise; it must be a contingent remainder. 2 *Saund.* 88. 2 *Cro.* 416. 1 *Saund.* 142. 3 *Co.* 31.

I see no reason to alter the word *or*; if you do, why may not we read it, *if she dies before her mother, or after without heirs.*

Adjournatur. And afterwards *Pratt C. J.* delivered the resolution of the court.

We are of opinion, that the first part of the will is no devise, the testator only taking notice how the estate was settled before, that if he made no will his wife would have it for her life, and after her decease of right it would go to his daughter *Elizabeth* for ever. The devise therefore to the defendant can be only considered as a contingent remainder, or an executory devise: as an executory devise it cannot be good, for the contingency is too remote; and it is not like the case of *Lloyd v. Cary*, where the contingency was so very near the compass of a life, whereas here it is limited on the wife's having no issue male by a second husband, and the daughter failing of heirs.

As a contingent remainder it will not do for want of a particular estate, taking the first part of the will to be only a declaration how his estate was settled, and not as a devise to the daughter.

Besides, it appears the contingency never happened, for the daughter did not die before the mother, consequently the lessors of the plaintiff, who are both heirs to the daughter and heirs to the devisor, must enter, and therefore the plaintiff must have judgment.

Crompton *vers.* Ward.

Intr. de Hill. 4 Geo. rot. 379.

IN case for the escape of *Mary Oglethorpe*, the declaration set forth, that *Mich. 2 Geo.* in *C. B.* the plaintiff recovered judgment against her for 232 *l.* which coming into *B. R.* by writ of error, the writ was *non pros* and execution awarded, which judgment is still in force: That 12 *June 2 Geo.* the said *Oglethorpe* surrendered herself to the *Fleet* in discharge of her bail, from whence she was removed by *habeas corpus* to *Newgate una cum die et causa*, &c. where the plaintiff intended to charge her in execution, but the defendants, sheriff of *Middlesex*, voluntarily permitted her to escape. The defendants confess the said *Oglethorpe* in their custody, *prout*, &c. but say that 20 *Junii* a *habeas corpus* was delivered to them, requiring them to bring her to the Chief Justice's chamber, upon which they made a warrant to their bailiff commanding him to carry her and bring her safe back again, by virtue of which he took her out of *Newgate*, and in carrying her along she was rescued. The plaintiff demurs. And *Mich. 5 Geo. Yorke pro quer'* took three exceptions to the manner of pleading,

Qu. Whether a rescue upon a habeas corpus between judgment and execution be pleadable to an action of escape?

1. It is improperly pleaded: they should not have set forth the fact, but the operation of law resulting from that fact; therefore

pleading the rescue from the bailiff is wrong; it ought to have been as from the sheriff, for the law takes no notice of a bailiff or his acts. In *Cooke's case*, *Hil. 2 Geo.* a rescue was returned on a bill of *Middlesex* in this form: that a *capias ad satisfaciendum* issued to the sheriff, who thereupon took the debtor, and the rescue was made of the prisoner under that arrest: exception was taken, that this return was only argumentative, because an escape of one in custody of the sheriff is an escape for all suits wherein he had process. The return indeed was held good, it being *veritas facti*, but the court held it would have been otherwise in pleading. *2 Saund. 97.* If one jointenant pleads that the other *concessit* to him, it is ill; for it should have been pleaded as a release, that being the only proper conveyance between jointenants. *2 Vent. 149, 260, 266. 3 Lev. 290.* That was pleaded as a grant, which could only enure as a covenant to stand seised, and the plea was held ill; for it ought to have been pleaded according to the effect of it in law. *Salk. 8, 274.*

2. The defendants ought to have averred, that she was not afterwards found *in balliva sua*. *Dalt. 215, 216. Officina Brevium 203, 204, 217, 226.*

3. The *habeas corpus* requires her to be brought *sub salvo et securo conductu*, but the defendants have not shewn that they complied with this direction; and this they ought to do, when they plead a rescue.

As to the principal point, whether the rescue here pleaded be a sufficient excuse; I must observe, that such returns have never been favoured, because there may be fraud and combination impossible to be discovered, and they infer a reflection upon the King, by supposing an unlawful force, as appears by *Westm. 2. c. 39.* which recites, that the sheriffs *multotiens falsum dant responsum, mandando quod non potuerunt exequi praeceptum regis propter resistantiam*: and concludes, *Caveant vicecomites de cactero, quod huiusmodi responsio redundat in dedecus domini regis et coronae suae.* A return of a rescue may discharge the sheriff against the King, but not against the party. Formerly such a return of a rescue upon *mesne* process was held not pleadable, because the sheriff might take sufficient power of the county. *Cro. Eliz. 868.* But since in the case of *May v. Proby*, *Cro. Jac. 419. 3 Bulst. 198. Moor 852. 1 Roll. Abr. 807.* it has been resolved, that the arrest being on *mesne* process, and not upon execution, the sheriff is not bound to take the *posse comitatus*, and therefore rescous is a good return: but if the prisoner had been once in the gaol, the sheriff ought to keep him at his peril, and rescous is no excuse, for he is to take care that his prison be strong enough to keep the prisoners. And upon process of execution such a return is no excuse against the King or the party, for the process

process being once executed, the party can have no other: from this case I draw two inferences, 1. That when the prisoner is once in gaol, a rescue thence will be no excuse to the sheriff. 1 *Roll. Abr.* 807. *pl.* 3. 33 *H. 6.* 1. 4 *Co.* 84. *a.* is a much stronger case than the present; for there it is held that if rebel subjects break the prison, whereby the prisoners escape; this is no excuse, though it is otherwise where it is done by foreign enemies. In 33 *Hen. 6.* 1. the case was adjourned, but in 16 *Ed.* 4. 3. it is resolved by all the Judges; and the marshal of *B. R.* was forced to get an act of Parliament. 2. The other inference is, that wherever the sheriff may raise the *posse*, he is not excusable for a rescue, because no power is by intendment able to resist the sheriff and his *posse*. 8 *Hen.* 4. 19. The prisoner here is to be taken to be in actual custody. It cannot be intended the *habeas corpus* was sued out at the instance of the plaintiff, and the sheriff might have raised the *posse*; the very words of the writ suppose it, *sub salvo et securo conductu*. Since it appears therefore, that the sheriff is liable for the rescue of one in execution, and for a rescue out of the prison where the custody is on *mesne* process only, because in those cases he may raise the *posse*, I can see no reason to distinguish this case from those, and why he may not have the *posse* in one as well as in the other.

Bootle contra. As to the first objection, we may plead either according to the truth of the fact, or the operation of the law upon that fact, and either way is good. *Palm.* 532. 2. We have confessed and avoided the escape, and the cases cited are of returns, where it may be necessary to say the party was not afterwards to be found in his bailiwick; because according to the latter resolutions, 1 *Vent.* 269. which denies the sheriff of *Essex's* case in *Hob.* 202. the prisoner may be re-taken, and therefore the return must answer every possibility, which need not be done in pleading. The third objection depends upon the principal point, as to which I must observe, that it appears *Oglethorpe* was not in execution, for which reason case is brought, because the 1 *Rich.* 2. *c.* 12. gives debt only for the escape of one in execution. 11 *Hen.* 4. 11. *A.* wounds *B.* and being in the custody of the constable escapes, and then *B.* dies; the constable is not answerable as for the escape of a felon. *Salk.* 614. 2 *Mod. Caf.* 158. At this day a rescue upon *mesne* process is a good excuse, though the former opinions were otherwise. 3 *Lev.* 46. 2 *Lev.* 144. and 2 *Cro.* 419. *May v. Proby.* There is a great difference between prisoners at large, and those in actual custody; the latter by *Westm.* 2. *c.* 11. may be kept in irons, but that extends only to such as are within the walls of the prison: one in custody out of the prison is not required to have so strict a guard, and therefore, though a rescue out of the gaol of one in upon *mesne* process makes the sheriff liable, yet he is not so for the rescue of a person

not carried to gaol. On a *habeas corpus* the sheriff may go out of the way with the prisoner, provided he has him ready at the return of the writ. 3 Co. 44. a. The sheriff is obliged to bring out the party in obedience to the King's writ, and he is not compellable to have a stricter guard than for a person arrested on *mesne* process: a common *capias* has the words *salvo custodias* as well as the *habeas corpus*, so no inference can be drawn from the wording of the writ. The reason why the sheriff shall raise the *posse* in case of execution doth not hold in this case; for the party doth not lose his debt, nor even his process, for there may be a re-capture: the statute of *Marleberge*, c. 21. and *Westm.* 1. c. 17. *Westm.* 2. c. 39. are but in affirmance of the common law. 2 *Inst.* 454. For the sheriff might have had the *posse* before. But though he may, yet he is not obliged to raise the *posse* upon every occasion, for it is to be presumed men will act according to law, and the contrary is never supposed. 10 H. 7. 26. The sheriff in this case might plead a re-capture. *Godb.* 177. And as on a *habeas corpus* he may let the prisoner go out of the way, it shews he is only considered as a person in custody upon *mesne* process: escapes being so penal, the judges have always made a favourable construction for the officers. 3 Co. 44. a.

Yorke replied. This is more than a custody on *mesne* process. The demand *transit in rem judicatam*; and if the sheriff is not liable, it will be very easy to bring a *habeas corpus* for no other end, but to let the prisoner escape.

Chief Justice. Here the fact pleaded is true, that she was in the custody of the bailiff, and rescued from him; and though this amounts in law to the custody of the sheriff, yet it differs from the cases of grants, for there the fact was not true: it was not a grant but a release, and a covenant to stand seised, but here the fact is true, and properly pleaded. 2. The defendants have confessed and avoided, and therefore it lay upon the plaintiff to shew a re-capture in his replication. The third objection likewise has nothing in it, for the words of a common *capias* are as strong.

As to the principal point, I cannot see how this case is distinguished from a custody on *mesne* process, where a rescue is pleadable. The sheriff was obliged to bring her out, and as she was not in execution, she can only be said to be in upon *mesne* process. *Powys* Justice accord.

Eyre Justice inclined the rescue was a sufficient excuse, and well pleaded.

Fortescue Justice *accord* as to the first objection. As to the second I think the plea should have gone on, and said she was not found afterwards; as this stands, there may be an intendment that she was. As to the third, it appears she was carried by one single officer, which is certainly a neglect. This is a sort of middle process after the plaintiff has run a long race; and though the crown may command the sheriff to bring out his prisoner, yet that is without prejudice to the party: she ought to be conveyed as securely as she is kept, and the sheriff here may have his remedy against the rescuers. He might before he brought her out have insisted on money to pay a guard.

Hil. 7 Geo. it was argued a second time, by *Wearg pro quer'*. The question is, whether after judgment and before any charge in execution, a rescue on the party's being brought out on a *habeas corpus* be a good excuse for the sheriff in an action of escape.

To prove it no excuse I shall consider, 1. What are the grounds of this action, taking it as intirely new. 2. Compare it with the resolutions already in the books. 3. The objections that have been, or may be made.

1. To consider the foundation of such an action; and that is the damage which the plaintiff has sustained by the neglect of the defendant, which he might have prevented by the use of those means that he had in his power; for the law supposes the *posse* to be a sufficient defence against a rescue, and that no force is able to resist the sheriff and his *posse*. Here is not the act of God, as fire; or any foreign force, as the case of enemies, which I admit are excuses for the sheriff. 33 *Hen.* 6. 1. 16 *Ed.* 4. 3. 4 *Co.* 84. 1 *Roll. Abr.* 808. The sheriff may if he pleases raise the *posse* in execution of any process whatsoever. 2 *Inst.* 193. 3 *Hen.* 7. 1. *Dalt. Sher. cap.* 20. p. 104. *cap.* 95. p. 354. 5. The plea admits the neglect, and the officer has a fee. 3 *Bulst.* 212. *Cro. Eliz.* 873. 1 *Vent.* 268. *Winch* 90. 21 *Ed.* 3. 45. b.

2. The cases in the books. I would compare this with the case of a rescue of one taken upon *mesne* process before he is carried to gaol. In Queen *Elizabeth's* time this question was determined against the sheriff. 3 *Cro.* 868. *Noy* 40. But I admit it has since been resolved otherwise. 3 *Bulst.* 198. And now it is held, that the sheriff shall not be answerable. 2 *Cro.* 419. 1 *Roll. Abr.* 807. *D.* 1. 1 *Lev.* 144. 3 *Lev.* 46.

But taking the law according to the latter resolutions, I shall shew, that the reasons they go upon do not affect this case.

1. In the case of *mesne* process though the sheriff may, yet he is not bound to raise the *posse*. *Dalt.* 154. But in this case, where the prisoner is conveyed by process after judgment, he ought to take the same caution, as if he was upon a *capias ad satisfaciendum*, nay a greater, if he observes the words of the *habeas corpus*, which require him to convey the prisoner *sub salvo et securo conductu*. Besides, this is a process not so easy to be renewed as a *capias ad satisfaciendum* or *mesne* process. *Cro. Car.* 240, 255.

2. Another reason why rescue on *mesne* process is an excuse is, because of the multiplicity of such writs, which are executed at the same time in different parts of the county, which makes it impossible for the sheriff to raise the *posse*; but this is a writ which rarely issues, and there is no danger of having many of them to execute at the same time.

In the case of *mesne* process the plaintiff has the conduct of that, but the defendant may purchase the *habeas corpus*.

3. The objections are, 1. That we may have our remedy against the rescuers; but will not they send us back again to the sheriff? Besides, it is a doubt whether the plaintiff has any remedy against the rescuers; the sheriff indeed has, and therefore he is not hurt by being subjected to our action. *Hutt.* 95. 2 *Cro.* 419. *Cro. El.* 53. The wrong is done by both the sheriff and the rescuers. 1 *Roll. Abr.* 698. B. 3.

2. Say they, why should the *habeas corpus* put the sheriff in a worse condition, when he is obliged to bring her out in obedience to that command? But we say, no command of the crown can excuse him as to the subject. *Dyer* 296. b. 297. a. 1 *Roll. Abr.* 808.

3. It is objected, that this will be a hard case upon the sheriff, who may be ruined by combinations between the plaintiff and defendant. But has not the law furnished him with the means to prevent any thing of that nature, by investing him with a power to raise the *posse*?

Upon the whole it appears here has been a neglect, an interruption of the course of justice, a damage to the plaintiff, for which he ought to have redress.

Reeve contra. This is a rescue of one in custody on *mesne* process only, and not out of the walls of the prison: for she was brought thence by the King's command, which the sheriff was bound to obey. And 4 Co. 44. it is said, that every thing is to be taken most favourably for the officer. In the case of a *capias ad satisfaciendum*, the reason why the sheriff was liable was, because the party could have no new writ. *Hob.* sheriff of *Essex's* case. Though it is otherwise resolved since, that the party himself may retake him. 1 *Sid.* 330. 1 *Lev.* 211. 2 *Keb.* 340. 2 *Lev.* 109, 132. 1 *Vent.* 267. *Show.* 177. But what if he is rescued on *mesne* process, and cannot be re-taken; does not the plaintiff lose his debt as much as in the case of an execution? The reasons now given for that case, are not given in the books.

This is no more than a custody on *mesne* process out of the walls of the prison; every common *capias* has the words *salvo custodias*, so no argument can be drawn from those words in the *babeas corpus*. The sheriff is liable in no case for a rescue, but where he was obliged to take the *posse*, which here he was not. If the sheriff after the party is charged in execution, brings him out on a *babeas corpus*, it is no escape if he goes out of the direct way. 3 Co. 44. *Moor* 257.

And as to the objection that the plaintiff is no party to the suing out the *babeas corpus*; is not that the case where there are several processes charged against the same person, and he is rescued when taken on one only? And though the warrant is to one bailiff only, yet that is no argument of a neglect, because that bailiff had it in his power to raise the *posse* without resorting back to the sheriff.

Adjournatur. And this term *Pratt* Chief Justice delivered the resolution of the court.

It was admitted at the bar, and is not now to be disputed, but that on the one hand if the sheriff arrests the party by virtue of *mesne* process, and he is rescued as he carries him to gaol, it will be a good excuse for the sheriff. *Cro. Jac.* 419. And on the other hand, if the party be once within the walls of the prison, though the custody be on *mesne* process only, yet a rescue from thence by any but common enemies will be no excuse: if a company of rebels break the prison, and let out the prisoners, yet the sheriff is answerable; because the law supposes the sheriff and his *posse* are sufficient to resist such a force. 1 *Roll. Abr.* 811. 4 Co. 84. These, I say, are grounds that are not to be disputed.

The

The case at bar is new, and differs from both these; but, however, we must take it up upon the different reasons of those cases. In the case of *mesne* process the sheriff, if he meets the party against whom he has such process by accident, and is told it is the defendant, he is bound to arrest him; and then because it is not supposed that he has always the *posse* along with him, he is excused against a rescue. But in the present case there is no such danger of surprize, he has notice before, that such a day he is to bring the party out of prison, and it is his duty, and so he is directed by the writ, to provide for the sure and safe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an interest, a sort of property in the body of the prisoner, has sustained a damage. This damage has happened by the neglect of the sheriff, and therefore he must answer it to the plaintiff in this action. Judgment *pro quer'*.

Trinity

Trinity Term

7 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Dominus Rex vers. Butcher.

EXCEPTION was taken to an order of bastardy, that it did not appear the child was born in the parish to which the relief is ordered: for it ran, *We A. and B. two justices of the borough of Lime Regis, residing within the limits where the parish church is, within which parish the child was born, do, &c.* which is only an averment, that the justices resided in that parish where the child was born, but that might not be the same parish to which relief is given; and for this fault the order was quashed.

In order of bastardy it must appear the child was born in the parish to which relief is ordered. Salk. 474.

Pas. 3 Geo. 2. Rex v. Childrens an order was quashed, for not shewing the child was born in the parish, to which relief was ordered.

Between the Parishes of Eastwoodhey in com' Hants and
Westwoodhey in com' Berks.

If a son grown
up removes
with his fa-
ther as part of
the family, he
gains a new
settlement
with the fa-
ther; but if
the father af-
terwards re-
moves and
leaves him be-
hind, he gains
no settlement
in this last
place.

UPON appeal from an order of two justices for the removal of *Robert Baker*, *Elizabeth* his wife, and *Thomas* their son under seven years, from the parish of *Westwoodhey* to the parish of *Eastwoodhey*, the sessions state the fact specially for the opinion of the court.

That forty years since, *Thomas Baker*, the father of this *Robert*, was seised in fee of a freehold estate in the parish of *Hampstead Marshal* in the county of *Berks*, where he lived till the year 1697. and had this son *Robert*, who was at that time eight years old. That in 1697. the father and all his family removed to *Cheveley*, where he rented a tenement of 20 *l. per ann.* for two years. That in 1699. he purchased a copyhold estate of 11 *l. per ann.* in the parish of *Westwoodhey*, whither he removed with his son and servants, and served churchwarden and other parish offices, and paid taxes, till 1716. when he purchased a cottage of 1 *l.* 12 *s.* 6 *d. per ann.* in *Eastwoodhey*, and went and lived upon it till his death; but they state it specially, that *Robert* the son staid behind in *Westwoodhey*, where he married a wife, and has work'd ever since on his own account, and that he is thirty years old. Upon the whole, the sessions confirm the order of the two justices for his settlement at *Eastwoodhey*.

Strange moved to quash the order of sessions, for that the settlement of *Robert* the son is either at *Hampstead Marshal*, where he was born, and where he lived till eight years old: *Salk.* 470. Or if it should be carried so far, as that he gained a new settlement with the father, by removing with him as part of his family, according to the case of *Cummer v. Milton*, *Salk.* 528. yet that can carry him no farther than *Westwoodhey*, which is the last place to which he accompanied his father; but let the settlement be in either it is not material now, the only question being whether here is any settlement in *Eastwoodhey*, for which there is no colour.

Mr. Strobe e contra insisted, that let the son be of what age he will, he shall follow the settlement of the father, till he gains one by his own acquisition; and it appearing he had never done any thing to gain a settlement by act of his own, either in *Hampstead Marshal*, *Cheveley*, or *Westwoodhey*, then he must follow the settlement of the father as well in *Eastwoodhey* as in any of the rest.

C. J. The question is not where this man and his family are settled, but whether there appears a settlement of him in *Eastwoodhey*. If he had gone thither with his father as part of the family, possibly it might have been a settlement of him there, but by staying behind he was divided from his father, and therefore there is no colour to make it a settlement in *Eastwoodhey*. I think his settlement is in *Westwoodhey*, which was the last place where he lived as part of the father's family. To which *Powys J.* agreed. *Et per Eyre J.* He is settled at *Westwoodhey*, and it is not material how that settlement was acquired, whether by his own act, or the act of his father. Suppose a master has two farms in two parishes, and he removes during the year, and leaves the servant behind to take care of the farm: shall the master's gaining a new settlement transfer the settlement which the servant gains by his service? Certainly it shall not.

Fortescue J. accord', and the order was quashed.

Jeffry vers. Wood.

Mich. 7 Geo. rot. 264.

THE plaintiff in error assigned errors in law, and in fact; and on demurrer for duplicity the question was, what judgment the court should give; and after consideration they ordered an entry, *quod affirmetur*, according to *Yelv. 58*.

On demurrer to assignment of errors the judgment is *quod affirmetur*.

Turton vers. Hayes.

THE plaintiff had been *non pros'd* in a former action for want of a declaration, and now in a second action Serjeant *Whitaker* moved, that the defendant might be discharged upon common bail, alleging it to be the practice of *C. B.* *Sed per curiam*, We know of no such practice here, and think it very unreasonable; for the plaintiff suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before.

After *non pros.* the defendant shall find bail to the second action.

Bellew *vers.* Scott.

Pas. 6 Geo. rot. 408.

In the case of an executor if a *devastavit* be returned, there needs no allegation of a conversion to their own use.

ERROR, *tam* in the award of execution in a *scire facias* against executors upon a judgment against their testator in C. B. in Ireland, *quam in affirmatione ejusdem* in B. R. there.

Strange pro querente in errore took several exceptions, and *inter alia*,

First, The proceedings are against a man and his wife as executrix, and the *devastavit* is returned in this manner, that goods of their testator did come to their hands sufficient to pay the debt, which they (*i. e.* the husband and wife) have wasted and converted to their own use, which he said a *feme covert* could not do; and cited 1 *Ven.* 12, 24, 33. where in trover it was held ill, to say a *feme covert* converted goods to her own use; and though this be the case of an executrix, who has a particular interest in the goods, and may dispose of them as she pleases; yet that cannot alter the case, because the conversion has quite extinguished that particular interest of hers, and can enure only to the benefit of the husband. 1 *Roll. Abr.* 932. *F. 1.* speaks of the sheriff's returning, that the husband had converted, and he says that in that case the execution shall be *de bonis propriis* of the husband, whereas here it is awarded against the goods of them both. *Sed per curiam*, The precedents are so as this in the case of a *feme* executrix. It is sufficient to say that the wife wasted the goods, without going on to speak of a conversion; and therefore if the expression be not proper, we may reject the *converterunt in usum suum proprium*. In trover it is essential, but here it is not. 1 *Roll. Abr.* 930. *pl. 9.* *Cro. Car.* 519. are, that the judgment on such a return shall be *de bonis propriis* of both.

The court may award a *certiorari* before errors assigned.

Second exception. Upon the writ of error in B. R. before errors assigned, or diminution alleged, there goes a *certiorari*, by which all the several processes of execution are brought up and made parcel of the record; whereas the only ground for awarding it can be to verify or falsify an assignment of errors, and therefore it should not have issued before. *Sed per curiam*, The court may take notice, that the record is imperfect, and award the writ for their own satisfaction.

Videtur cur' is no essential part of the judgment.

Third exception. In all judgments it must appear, the court has fully considered of the case, and are convinced that the judgment they

they give is right at the time of pronouncing it; and in *Salk.* 402. *Atwood v. Burr*, a judgment on demurrer was held erroneous, for want of *quia videtur cur' quod placitum minus sufficiens in lege existit*. In the case at bar it appears the judgment was affirmed before the merits of the case had been considered, for the record is, *quia videbitur*, in the future tense, instead of *videtur*: so that because it will appear at a time to come, that the record is right, therefore do they before that time affirm the judgment.

Sed per curiam, That case of *Atwood v. Burr* was of an inferior court; neither (as Mr. J. Eyre said) is the report of it right; indeed that point was mentioned in *Mich. 1 Ann.* but the cause hung till *Hil. 4 Ann.* when the judgment was reversed on another point. *Videtur cur'* is no judgment, *Cro. El.* 145. and is implied in the *ideo consideratum est*. There was a case in the Exchequer Chamber, where the *quia videtur* was, that the defendant's plea is good, *ideo consideratum est*, that the plaintiff have judgment. But the court said, that if it did not appear to be erroneous, they would not reverse it merely because a wrong reason was given for the judgment. The judgment was affirmed.

Robins vers. Sayward.

PER curiam, We cannot ground an attachment for non-performance of an award on the affirmation of a quaker; for though it be in a suit between party and party, yet it is a criminal prosecution within the proviso of the statute 7 & 8 W. 3. c. 34.

Quaker no witness to ground an attachment for non-performance of an award.

Bromley vers. Frazier.

CASE upon a foreign bill of exchange by the indorsee against the indorser, and on general demurrer it was objected, that they had not shewn a demand upon the drawer, in whose default only it is that the indorser warrants: and because this was a point unsettled, and on which there are contradictory opinions in *Salk.* 131. and 133. the court took time to consider of it.

Indorser of bill of exchange may be charged, without first resorting to the drawer.

And on the second argument they delivered their opinions, that the declaration was well enough. The design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie; now to require a demand upon the drawer, will be laying such a clog upon these bills, as will deter

every body from taking them: the drawer lives abroad, perhaps in the *Indies*, where the indorsee has no correspondent to whom he can send the bill for a demand, or if he could, yet the delay would be so great that no body would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travail round the world before he can fix his action upon the man from whom he received the bill. In common experience every body knows, that the more indorsements a bill has, the greater credit it bears; whereas if those demands were all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorfor warrants only in default of the drawer; there is no colour for it, for every indorfor is in nature of a new drawer, and at *nisi prius* the indorsee is never put to prove the hand of the first drawer, where the action is against an indorfor. The requiring a protest for non-acceptance is not because a protest amounts to a demand, for it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who by the other's drawing is supposed to have sufficient wherewith to satisfy the bill.

Upon the whole, we are of opinion, that in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorfor, but the indorsee has his liberty to resort to either for the money. Consequently the plaintiff must have judgment.

Dominus Rex *vers.* Carter.

INDICTMENT for trespass before justices of peace, and excepted that it did not appear they had any jurisdiction, for want of *necnon ad diversas felonias transgressiones et alia malefacta in comitatu praedicto perpetrata audiendum et terminandum assign'*, for these words are in all the commissions ever since 18 *Edw.* 3. and the opinions have been, that without that clause the justices as justices cannot hear and determine. *Lamb. Just.* 46, 47. *Cro. Jac.* 633. 1 *Ven.* 33. 2 *Keb.* 160. 2 *R.* 3. 9.

Hil. 10 *Geo.*
Rex v. Straw.
Another
quashed on
the authority
of this case
without de-
bate.

Et per curiam, The indictment must be quashed. At first the justices were only conservators of the peace, and the subsequent power to hear and determine given by the statutes 18 and 34 *E.* 3. is only, that by commission they may have such a power. The commission of the peace appears to have been altered into the present form immediately after making those statutes, which shews the opinion of the King's council at that time. *Lambart* says, that *they shall*

shall have power, which must be understood *by commission*. As therefore this is not a proceeding upon their common law jurisdiction, but a jurisdiction given by statute; whenever they hold such pleas, they must shew an appointment to hear and determine, and we cannot intend that they have such a power.

Everett *vers.* Gery.

ON the return of the second *scire facias* against bail, a four days rule was given, and on the fourth day the principal brings error, and Mr. *Wearg* thereupon moved to stay proceedings against the bail, pending the writ of error; and cited *Myer v. Arthur*, ante 419. and *Church v. Throgmorton* in the House of Lords, where the House threatened to commit the attorney, for proceeding against the bail pending error in Parliament.

Where error is not brought till it is too late for the bail to surrender, the court will not stay proceedings.

Trin. 10 Geo. Alridge v.

As to the first case, the court said, it differed, for there the bail came in time, while they might surrender the principal; which they cannot do here, after the return of the second *scire facias*, at which time no writ of error was brought. And as to the case in the House of Lords, it was there agreed, that the court below could not restrain them; but the Lords said they expected more respect. *Curia*. We can make no rule.

Snowden, they did not move till both *sci. fac.* were out and the rules upon them, and the court held they came too late.

Dominus Rex *vers.* Landen.

A Conviction of forcible entry was moved to be quashed, because taken before justices *ad pacem in comitatu praedicto conservandam assignatis*, without saying *pro comitatu*. *Salk.* 474. *Sed per curiam*, Let it be quashed for another fault, that it is in the preterperfect tense *accessimus et vidimus*, whereas it should have been in the present tense.

Conviction of forcible entry in the preterperfect tense, ill.

Dominus Rex *vers.* Stapleton.

STRANGE moved, that the defendant who was convicted for a misdemeanor, and lay in execution for the fine, might assign errors by attorney, to save the charge of being brought up; the clerks saying it could not be otherwise without leave of the court. *Curia*. It is in our discretion, let it be so.

Practice;

Watkins *vers.* Parry.

In case of bail bond the arrest of the principal is not traversable.

DEBT upon a bail bond, the defendant traversed the arrest of the principal; and on demurrer judgment was given for the plaintiff; for otherwise this will be a way to avoid all bail bonds that are civilly taken, without exposing the party by an arrest.

Dominus Rex *vers.* Barber.

On attachment, party not bound to answer what may convict him of another offence.

HE presented a petition to the common council of *London*, reflecting upon one of the aldermen, and used contemptuous words of this court at the same time. For the petition the court granted an information against him and those who signed it, and for the contempt, an attachment.

The prosecutor in his interrogatories asks him, If *he* did not present the petition, and use such and such words. And now the defendant moved, that the interrogatory, as to presenting, might be struck out, because it is making him accuse himself of that which will convict him of the libel. *Et per curiam*, He is not obliged to answer it; you may ask him whether, when the petition was presented, he did not say so and so; therefore let that part of the interrogatory be struck out.

N. B. This prosecution went no further, the act of grace interfering.

N. B. I drew them at first as the court now settled them, but that question was put in after they went from me, though I cautioned the attorney against it.

Dominus Rex *vers.* Clarkson et al'.

On a *habeas corpus* the court will make no other order as to the party, but to see he is under no illegal restraint.

DIBLEY pretending to have married Mrs. *Turberville*, a lady of fortune, took out a *habeas corpus* directed to her guardians, commanding them to bring her into court. To this writ I drew a return, that by her mother's will she was committed to the care of Mrs. *Clarkson*, who had put her out to school to the other defendant, where she had continued ever since with her own liking, and with the approbation of her guardian; and that she now remains there of her own accord, under no restraint: *et nulla alia est causa, &c.*

When she was brought into court, and the return had been read, the Chief Justice asked her, if she desired to be taken out of the hands

hands of the persons she lived with, and go with *Dibley*? She denied him to be her husband, and desired she might continue with her guardians. *Et per curiam*, We have nothing to do to order her to go with *Dibley*, but only to see that she is under no illegal restraint: all we can do is, to declare that she is at her liberty to go where she pleases; but lest this writ be made use of by *Dibley* as a means to get her abroad, and seize her, (as I told the court we had reason to apprehend) we will order our tipstaff to wait upon her home to her guardians; and so it was done in lady *Harriot Berkeley's* case, 3d Vol. *State Trials* 78.

Power vers. Jones.

THE defendant brought a writ of error *coram vobis*, and assigned infancy and appearance *per* attorney. *Strange* moved, that the attorney might be obliged to set it right, and cited *Goodright v. Right*, and *Stratton v. Burgiss*. But the court said they could not do it in this case, because here was no express undertaking to appear, as there was in those cases; if there had, the court would oblige the attorney to do it in a proper manner.

Appearance of infant by attorney, not amendable. Ante 25, 114.

Busby vers. Greenplate.

At nisi prius in Middlesex coram Pratt C. J.

IN ejectment the Chief Justice ruled this case. *A.* surrendered a copyhold estate to the use of his will, and then devised it to *B.* for life, and after his decease to the heirs of his body. *B.* died after making the will; and it was held, that his heir could take nothing, for it is a devise in tail to *B.* and *his heirs* are words of limitation; and then *B.* dying in the life of the devisor, it is the same case with *Fuller v. Fuller* in *Cro. El.* and *Goodright v. Right*. And the Chief Justice said, it made no difference, that those cases were of freehold lands, and this of copyhold where the devisee was living at the time of the surrender.

Where the devisee of copyhold dies after the surrender and before the death of the devisor, the devise is void.

In this case a person, who had sold the inheritance without any covenant for good title or warranty, was allowed to be a witness, to prove the title of the vendee.

Vendor witness as to title, where no covenant for warranty, &c.

Jocelyn *vers.* Hawkins.

At Guildhall, coram Pratt.

In contracts
for stock the
computation
must be by
lunar months.

THE contract was to deliver stock one month after; the tender was according to the calendar month. But the Chief Justice ruled it must be a lunar month, though we called a great many witnesses to prove the course of the alley to be to reckon according to calendar months. So my client was called. *Vide* 4 *Mod.* 185.

Anonymous.

At Nisi prius, coram Pratt Chief Justice, in Middlesex.

Action against
a constable
not confined
to the proper
county, where
he does not
act in execu-
tion of his
office.

TRESPASS and assault. On the evidence it appeared the defendant was a constable, and lived at *Dover*, and that being ordered to take the plaintiff and carry him before the mayor, he executed his warrant, and the mayor discharged the plaintiff. Soon after which a dispute happening between the plaintiff and the defendant, the defendant beat the plaintiff, for which this action was brought.

For the defendant they insisted, that he being a constable, they should have brought the action in the proper county, according to the statute 21 *Jac.* 1. *Sed per Pratt* Chief Justice, That is only where it is for a matter relating to the execution of his office; but if after his authority is expired, he abuses the party; or if he meets a man and knocks him down, he may be sued for it as all other people may.

Dominus Rex *vers.* Jeffries. *Ibidem.*

Evidence.

KEBLE's statutes and *Rastal's* differed, and they who were for adhering to *Keble* proved that they had examined him with the Parliament roll. The Chief Justice ruled it was enough, and *Keble* was read.

Sir

Sir Harry Peachy *vers.* The Duke of Somerset. In Canc'.

THE plaintiff brought his bill to be relieved against a forfeiture of his copyhold by making leases contrary to the custom of the manor without licence of the lord, felling timber, digging stones, and grubbing up hedges; offering to make a recompence. And on the pleadings the case was this: Sir *Harry* being seised of a copyhold estate of inheritance of 90 *l. per annum*, held of the manor of *Petworth*, of which the Duke of *Somerset* is lord, made a lease of part of it for seven years without licence at 13 *l. per annum*. The Duke upon this brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his son an infant's name for relief. The Duke in his answer insisting on other causes of forfeiture, besides the making the lease without licence, Sir *Harry* brought a supplemental bill for discovery and relief against those other forfeitures: upon the plaintiff's giving judgment in ejectment subject to the order of the court, an injunction was granted, and now upon the hearing the case came out to be this.

No relief
against a vo-
luntary for-
feiture of co-
pyhold estate.

Upon Sir *Harry*'s marriage in 1693, all the copyhold lands were surrendered to the use of Sir *Harry* for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose, but no admittance was ever taken upon that surrender. Before Sir *Harry* came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir *Harry*'s time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father; the plaintiff had topped those trees that were on the copyhold part of the avenue, by which from timber they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed; but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without licence, or any custom of the manor to warrant it.

Upon this it came in question, whether any, and which of these several acts are forfeitures at law? And if so, whether any, and which of them are relievable in equity? And if not, whether the son's case is to be distinguished from the father's.

1. Whether these are forfeitures at law? Which were of four sorts: the digging the quarry, the topping the timber trees, the destroying the boundaries, and making the lease without licence.

As to the quarry the plaintiff's counsel insisted, it was opened even upon the copyhold in his father's time, and so purged by the admittance; and his digging in it since was but like the case of lessee who may dig in quarries and mines that were open at the time of his lease, though he cannot upon any new ones.

As to the topping of timber trees, which the plaintiff insisted was done only for the uniformity of his walk, and without design to injure the lord, It was answered that it was voluntary waste, and the motives for doing it are not material to the lord.

As to the destroying the fences, a case was cited out of *Litt. Rep.* 264, &c. where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without distinguishing between the outward boundaries and those within the copyhold, as it tends to the destroying the evidences relating to the lord's interest in the estate. And said it is on this foundation laid down 1 *Inst.* 53. that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making the lease without licence, it was acknowledged on allsides to be a forfeiture at law.

2. The next question was, whether supposing all these to be forfeitures, relief was proper in this court, either upon the general case of these sort of forfeitures, or any particular equitable circumstances that may be in the present case.

For the particular equitable circumstances of this case, one was, that the steward's deputy ingrossed and was a witness to the lease. This was compared to the lord's being privy to or witness to such lease, which would be held in equity as a permission or kind of licence; and it has been held, that licence granted by a deputy steward was good. But answered, that this rather aggravated the injury, by making the lord's servant a party in the confederacy to injure him.

Another circumstance was the plaintiff's not having notice of this custom. But this is not material, for the tenant comes in under the customs of the manor, and is bound to take notice of them; and besides, this is common law.

But if those circumstances were not sufficient to ground a relief upon, whether the general nature of those forfeitures will not admit of relief.

In favour of the plaintiff it was argued, that it is a sort of maxim that all forfeitures are odious. That copyholds are now become a more fixed and established estate than they were formerly, and the law itself has been altering these hundred years very much in their favour; and therefore a court of equity ought to go as much in their favour, to keep them out of that vassalage and subjection which the original nature of their estates laid them under, which their present fixed condition seems inconsistent with. That the forfeitures are intended only to secure the lord's rents and services, and therefore very proper for a court of equity to interpose and prevent his having more than that security. And this is agreeable to the common cases of relief against the penalty of a bond, and upon mortgages, and conditions of re-entry on non-payment of a rent, and *nomine poenae*: in which cases this court will not allow the parties to take any other advantage of the forfeitures, than what is necessary to satisfy the original intent of the agreement. The law has annexed these conditions in the case of copyholds instead of the parties; but as it had something else in view by them, than the gaining the land to the lord; this court may make amends to the lord, and fulfil the design of the law, and save the estate to the party. In the case of making a lease without licence, the intent of the law in making that a forfeiture is, to prevent the lord's being disinherited of his interest in the copyhold, and to secure the fine due on a licence; both which may be easily secured, by obliging the tenant either to accept a licence, or make surrender and admittance and pay the fine; which will be a compleat recompense for any injury the lord may have suffered; and then it comes within the common rule, that this court will relieve against forfeitures, wherever a compleat satisfaction can be made for the injury which is the cause of the forfeiture.

Several cases were cited. *Shelley v. Mason* in Lord Coventry's time, 5 Car. 1. where a copyholder came into this court to be relieved against a forfeiture by making lease without licence, and decreed the lord to account for the profits he had received since his entry, and pay the costs. 1 Chan. Rep. 51. where a copyholder was relieved by Lord Coventry for non-payment of fine on admittance. *Cox v. 2 Vern.* 664. *Hickford* by Lord Harcourt. The bill was to be relieved against a forfeiture by suffering a copyhold tenement to fall to ruin, and refusing to repair it for thirty years together, though frequently ordered to do it by the lord; the Chancellor refused to grant relief on two accounts, his obstinacy, and the lord's having been in possession nine

years after his entry, in which case great stress was laid on the obstinacy of the copyholder. Case of *Rowland v. Dean of Exon*, where relief was granted against a forfeiture by cutting timber. *Gnash v. Lord Derby*, the decree of which was now read in court. The plaintiff having a copyhold tenement that wanted repair, applied to the defendant the lord of the manor to have some timber assigned for that purpose, but the lord refused to assign any; upon which the plaintiff hearing that there was a custom in the manor for two tenants to assign timber for the purpose of repair, did get two tenants to make such assignment, and then cut the trees down; upon which ejectment was brought, and a verdict for the lord, there being no such custom: the plaintiff brought his bill for relief, which was granted on his paying the value of the timber and costs at law and in equity. *Cudmore v. Raven*, where a quaker being tenant of a copyhold refused to take the oath of fealty, and the lord entered for the forfeiture, and the tenant was relieved. *Cox v. Brown*. 1 Chan. Rep. 170. a lease being made on condition not to assign it without licence, the tenant did assign; but relief was granted on search of precedents; it being the case of an assignee of an executor makes no favourable circumstance, because there were assets without it. *Thomas v. Porter*. Tenant of a copyhold *durante viduitate* cut down timber upon one copyhold in order to repair another, which was a forfeiture; but yet relief granted in this court.

Abr. Ca. Eq.
121.

If it is a difficult matter to ascertain damages in any of these cases of forfeiture, it is because there really is no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

For the defendant, these distinctions as to relief against forfeitures were insisted on. Whether the forfeiture was for nonfeazance or malfeazance, whether the condition was annexed by law or the party, whether there were any particular circumstances of equity or not.

As to the difference between nonfeazance and malfeazance, as where tenant refuses to pay a fine upon admittance; this court will relieve, on doing that which he ought to have done. The difference is only as to the circumstance of time, which this court easily supplies. So where there is only permissive waste, the court has relieved; but if by obstinate refusal this forfeiture is aggravated, the court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox v. Hickford*.

All the instances of forfeiture in the present case are of voluntary acts. One is making a lease without licence, which is a disseisin

feisin of the lord, 4 Co. 21. b. and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law, and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract, if you give them every thing they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on non-payment of rent, &c. But even in conditions of the parties, where the ascertaining the damage is not plain and clear, the court will not relieve against such conditions or penalties. It was never known that this court relieved against a *nomine poenae* for ploughing up ancient meadow. It was denied in the duchy of Lancaster, *Eyre v. Hatton*.

But in cases of forfeitures on conditions in law this court seldom relieves. If tenant for life makes a feoffment, or levies a fine *sur consueance de droit come ceo*, &c. it was never pretended, this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitations of the estate of the party, and though the intent of the party is never so plain, equity will not alter the legal construction of the words: as where by will one gives an estate to *A.* for life, remainder to the heirs male of *A.* equity will not give the son of *A.* a remainder, and confine *A.*'s to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the court has granted relief, it is upon some such circumstances, as where the party who is to take advantage of the condition is himself the means of its being broke. It was said by Lord Somers in the case of *Bertie v. Falkland*, that conditions precedent Salk. 231. are not relievable, unless some indirect means be used by the party to prevent the performance. So in the case of *Hamond v. Ainge* before the present Chancellor, where a lord of a manor tells one that had a freehold held of his manor, that it was copyhold, and he must be admitted by copy of court-roll, and pay a fine: the lord was in this court obliged to erase the admittance, and repay the fine.

The third question relates to the infant plaintiff, whether he is in any better condition than the father.

It was admitted on all hands, that if an admittance had been taken pursuant to the surrender upon the marriage, the son being remainder man could not be prejudiced as to his estate by the forfeiture of the tenant for life: only in that case the bill was too early
for

for the son, whose interest was not concerned till the death of the father.

But though the son has no legal right, yet there being a surrender to his use, and this pursuant to a marriage agreement; it shall be considered in a court of equity as if it had been executed, and the infant would be very proper to bring a bill in this court against the father and the lord, in order to admit his father pursuant to the surrender, that he might in law be intitled to the remainder.

On the other side it was said, that Sir *Harry* not being admitted upon that surrender, continued tenant under his former admittance; and the lord was no party to, or concerned in the marriage settlement, his title was paramount to that, and consequently the forfeiture affected the inheritance, and should not be subject to or limited by the private trusts or transactions of the parties.

Lord Chancellor. This is a point of so great consequence, that if relief could be given in this court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecillity of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been indeed very favourable constructions for the copyholder in that particular, because he is called tenant at will *secundum consuetudinem manerii*; it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words *secundum consuetudinem manerii* was not to bound the lord's pleasure in the determination of his will, but that the tenant as long as he continued tenant was to hold his land under those terms and conditions which the custom had established.

These matters which are mentioned as forfeitures, are indeed limitations of the estate; such as determine it, when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right which he had before, and yet he does no damage to the remainder man. So tenant by copy taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate: the law has made it so; and what is there in this case to ground relief upon, and require me to set aside the law?

It is a hard law, and therefore the party must not be subject to it; but is not this directly repealing the law?

In action of waste for recovery of the place wasted, it is certain and admitted this court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I see any difference, whether the statute makes this condition, or the common law makes it.

It is not sufficient to say here is no damage in this case, and therefore it is there can be no recompense given by this court, for it is the recompense that gives this court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired: But it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose, as for non-payment of rent or fines, which are only by way of security of the rent or fine; and therefore when these are paid afterwards with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this court gives in those cases.

Cases of agreements and conditions of the party, and of the law, are certainly to be distinguished; you can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures. But what equitable circumstances are there peculiar to this case? It is certain there may be circumstances, which may make it fit and equitable for this court to relieve, either in these cases or in actions on the statute of waste: if the lord should give the tenant encouragement by *parol* only to pull down a mesuage, and he did it accordingly; this might induce the court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making the lease, and advised it; relief might be reasonable: but the steward's standing by, or even ingrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping the trees, and the destroying the boundaries; there does not enough appear to determine, whether they are legal forfeitures or no: but if they are, I think they are all, as the making the lease, under the same consideration in this court, and not proper for relief.

As to the infant, his case does not seem as yet ripe for this court; but it may be a question how far his equitable interest will intitle him to be secured against these forfeitures.

I am apprehensive the lord must always have such a tenant upon his lands, as may be sufficient to answer all demands, and capable of committing forfeitures.

Suppose one lets a trustee be admitted for him, who commits a forfeiture; no doubt the estate would be forfeited, and the *cestuy que trust* would have no equity against the lord.

Suppose the trustee should die without heir, the lord would be intitled by escheat, without being subject to the trust.

The person who is the legal tenant, is subject, with regard to that estate, to all the imbecillities of that estate; if not, by the means of a trust a copyhold would be intirely discharged from all those imperfections it labours under, and the lord's interest be taken away, for the lord can take advantage of no body's acts but those of his tenant. He is not at all concerned with the private agreements or trusts of the parties.

In the present case, suppose Sir *Harry* admitted according to the surrender, the infant is then tenant in remainder, and the father's act cannot prejudice the son, who is now admitted as a distinct tenant. But till admittance the son is no tenant; and suppose when he comes of age he should release to his father, there would be no occasion for any admittance at all, but Sir *Harry* would continue tenant upon his old admittance. The lord is not bound to take notice of any thing, but what appears on the court rolls.

I am therefore apprehensive, it will be a hard case to relieve the son. But I agree, that if the lord's fine for admittance be paid, though there was no actual admittance; since the lord received all the advantage that could be had from the admittance, it might be a good reason for relieving the son; and then it might be proper, perhaps even now, for the son to bring a bill against his father and the

the lord, in order to have his father admitted pursuant to the surrender. But it does not appear whether the fine was paid.

I should therefore for these reasons dismiss the bill absolutely. But since the points of law are disputed as to all the forfeitures, excepting the making the lease, which concern other parts of the copyhold, and since judgment in ejectment is given, which would take in other lands as well as those comprized in the lease; I think the bill should be retained, till the points of law are tried at law upon the ejectment, which the plaintiff shall immediately receive declarations in, and plead to trial.

As to costs, they shall wait the event of the trial, and as to them I think the equity of them will depend upon the issue of that; if the plaintiff recovers there, he should pay costs here, because he had no occasion to come into this court, excepting as to the discovery. If the Duke gets the better, I think as this is a point of equity that has not been fully settled before, and in such case it is natural for a man to struggle the most to retain his estate; it would be too hard to make him lose his estate and pay costs likewise.

As to the infant I will not dismiss the bill absolutely, but without prejudice, because being an infant he may not have made the best of his case.

Frederick *vers.* Frederick. Ibid.

IN the year 1674. a match was proposed between Mr. *Frederick*, The husband son of Sir *John Frederick* an alderman of *London*, and Mrs. *Marino*, a city orphan, whose fortune was 8000 *l.* in pursuance of which articles were entered into between Sir *John Frederick* and his son of the first part, Mrs. *Marino* and her relations of the second part, and certain trustees therein mentioned of the third part, by which it was agreed that Sir *John* should pay 11500 *l.* 5000 *l.* part of it, to Mr. *Frederick*, and the other 6500 *l.* to the trustees, which with the 8000 *l.* to be received from the chamber of *London*, should be vested in land, to be settled as usual upon the husband for life, remainder to the wife for life, remainder to the first and every other son in tail, &c.

The husband covenanted to take up his freedom in *London*, but did not, and his estate distributed according to the custom. 1 Will. Rep. 710.

Upon 25th of *February* application was made to the court of aldermen for licence for Mr. *Frederick* to marry Mrs. *Marino*, upon which several entries appear to be made that day; 1. That a licence be granted, if Mr. Common Serjeant approve of the marriage: 2. That when a person applies for a licence to marry a city orphan

phan he shall be urged to take up his freedom. 3. A freedom is granted to Mr. *Frederick*, which he is to take up in a year's time.

The marriage soon after took effect, and 15th of *March* 1680. Sir *John Frederick* being then deputy Mayor, there is an entry, that upon consideration Mr. *Frederick* had not taken up his freedom according to his agreement, whereby his wife would not be intitled to her thirds, it is referred to the Recorder and Common Serjeant, to consider, whether the settlement upon the lady was agreeable to the intent of the court; but there were no further proceedings, neither did Mr. *Frederick* ever take up his freedom, but proved a very unkind husband, and a severe father, and by his will devised 10*l.* only to his wife, 1000*l.* to his eldest son, and each of his daughters, and the residue of his personal estate, which amounted to 400000*l.* he gave to the children of his second son.

The widow preferred her bill, that she might have the benefit of the agreement, as if Mr. *Frederick* had taken up his freedom. And after several arguments Lord Chancellor pronounced his decree.

The demand of the plaintiff was grounded upon the common rule in a court of equity, that where an agreement is made upon a good consideration, which is not performed, the party interested may apply to a court of equity, to have the same benefit as he would have had in case the agreement had been performed.

It was urged, that the articles made by Sir *John* and his son with the lady and her relations, and which was a compleat agreement, do not contain any such clause that Mr. *Frederick* should take up his freedom. Answer: An agreement between some parties does not hinder other persons from entering into another agreement, and the agreement to take up his freedom was with the court of aldermen. Besides, the relations of the lady had no power to dispose of her in marriage, but the court of aldermen alone could make a legal agreement for that purpose; so that what was done by the relations was only proposals to be laid before the court of aldermen; they might have disapproved of the whole, or part, or have required something further. They might have agreed by *parol*, (for this was before the statute of frauds) that Mr. *Frederick* should do something further; they did require something further of Mr. *Frederick*, when they made their agreement with him, and this is proved beyond all doubt by the records of the proper court, which had cognizance of this affair, and had it then under consideration; so that this is in nature of a fine, for it is an agreement of the parties entered upon record.

It

It was urged, that this was only done by the city to provide freemen of substance for the benefit of the city, and not designed for the benefit of the lady, to be part of the agreement. Answer; This is a very strange construction, that a court of aldermen, when they are transacting a thing which concerns an infant under their care, should consider their own private interest, without any regard to the benefit of the infant; this is not to be intended of any persons who act in a publick character.

It was argued, that if the common serjeant approved the match, the licence was to be granted absolutely; and the agreement to take up the freedom was voluntary, and no part of the contract. Answer; What was referred to the common serjeant was only the validity of the settlement in point of law; not the sufficiency of it, which the court of aldermen could judge of better than the common serjeant. And the taking up his freedom is to be looked upon as part of the provision.

It was argued, that it is probable this part was waived afterwards. Answer; The court of aldermen could not waive it, because they were only trustees; and it is plain it was not waived before the marriage, because the court of aldermen some years after inquire into the reason why it was not complied with, and the wife being a *feme covert* could not waive it.

It has been said, that a court of equity ought not to give relief in this case, because it is to support a custom against the rules of law. Answer; A court of equity will support and execute a contract made upon a good and sufficient consideration, whether it relates to a custom or not, and will prevent a fraudulent avoiding of the custom, as a fraudulent disposition of goods.

It has been urged, that if the city had applied for the guardianship and care of the orphan under this settlement, they could not have had relief; because he was not actually a freeman when he died. Answer; There is no consideration arising from the city, and therefore no grounds for a court of equity to assist them.

It was objected, that the party being dead, it was become impossible that a specifick performance should be had, and this court will not give damages. Answer; Though a specifick performance cannot be had, yet the end and design of it may be obtained, which is all that a court of equity requires; for if he had been alive, and desired not to take up his freedom, to avoid the trouble and expence of bearing offices; and could he have given the court satis-

faction, that his wife and children should have the same benefit: I do not know that a court of equity would have compelled him to have taken up his freedom.

Objection: It will be very improper to admit such an application after his death; because had he been alive, he might have vested his estate in land, and disposed of it by will, as he has done of the personal estate. **Answer;** This is an argument not to be insisted upon in a court of equity, that the effect of the contract ought not to be decreed after his death, because had he known that you would have insisted on it, he would have contrived some way to have avoided it: where money is vested in trustees to be laid out in land and settled upon *J. S.* in tail; if he dies before the settlement, he cannot dispose of the money; and yet if the settlement had been made, he might have levied a fine, and suffered a recovery, and disposed of the land. A case was mentioned, that where tenant in tail makes a mortgage by bargain and sale, and covenants for farther assurance, and dies without levying a fine; a court will not compel the issue in tail to compleat the title. **Answer;** The issue in tail claims prior to the person who made the mortgage, and not as his representative. But where tenant in fee-simple makes a sale by bargain and sale, which is not inrolled, with covenants for further assurance, a court of equity will compel his heir to make good the title, because he is representative, and claims under the covenantor. So it is in the present case. Therefore he decreed that one third should go to the widow, and one third amongst the children, they waiving their legacies under the will. As to the other third, the will stands good as to that. Afterwards in *May 1731* the decree was affirmed in the House of Lords.

Merrit vers. Rane.

Trin. 6 Geo. rot. 338.

On a covenant to transfer stock paying so much.
Q^u. What is to be the first act?

THE plaintiff declares upon a special agreement, that in consideration of 252 *l.* paid to the defendant, he agreed to transfer 6000 *l.* *South-Sea* stock to the plaintiff, his executors, administrators or assigns, at any time before the 9th of *January 1720*, within three days after the same should be demanded by note in writing delivered to the defendant, or left for him at his house in *Angel Court*, upon payment of the further sum of 9000 *l.* Then he sets forth, that he appointed one *James Martin* to demand the stock, and pay the price it was agreed to be sold at, who on the 25th of *March 1720*, left a note in writing at the defendant's house, requiring him to transfer the stock on the 28th, where he says he attended

attended all the while the books were open, but the defendant did not appear to transfer. The defendant pleads, that the demand was made by the plaintiff the 20th day of *January*, and that upon the 21st he transferred the stock according to the agreement. The plaintiff replies, that he did not transfer the stock on the 21st *modo et forma* as he has pleaded. And the defendant demurs.

Wearg pro defendente took several exceptions;

1. This contract cannot be assigned, for it is a *chose en action*; and therefore the defendant was not bound to transfer to *Martin*, because that would not have been a performance of his agreement. And if it be said, that *Martin* is not an assignee of the contract, but only a person authorized to pay the money and take the stock; the objection to that is, that his authority is only to demand, not to receive the stock, for so the plaintiff has made his case in the declaration.

2. The demand is to be by notice to the defendant, or leaving a note *for him* at his house; but here the averment is only that a note was left at his house, and perhaps that might be so managed as never to come to his hands, which was designed to be obviated by the words *for him*.

3. The agreement is, that upon the transferring the stock the plaintiff shall pay 9000*l.* which if it be not a condition precedent, yet according to *Turner v. Goodwin* it is at least a concurrent act; and therefore the plaintiff should have shewn, that he had the money there to have paid upon the transfer; but all he says is, that *Martin* attended to accept the stock, not to pay for it, though his authority was at first both to demand and pay.

4. But if the declaration be good, yet the replication is ill, for the demand pleaded was on the 20th, and the transfer the 21st, which was the next day, so that if the issue was found for the plaintiff it would not do, because the jury could not find a breach of the condition in saying he did not transfer on the 21st, when he had two days after that to do it by the plaintiff's own shewing. It is to all purposes the same with payment before the day.

Reeve contra. I agree, *Martin* cannot be a legal assignee, but only a person appointed to transact this matter on behalf of the plaintiff. The assignment of a bond is good to some purpose, for it amounts to a covenant that the party shall have the money when received. *Martin* is appointed to require the stock and pay for it, which necessarily gives him a power to take it.

Assignment of a bond amounts to a covenant that the party shall have the money.

2. Notice

2. Notice left at a man's house is in the nature of the thing a notice left *for him*.

3. The money was not to be paid but upon transferring, so no necessity of a tender; and we having shewn that the defendant was not there to perform his agreement, that is enough to intitle us to our action.

4. Here the day is material, and might therefore very properly be made parcel of the issue:

Chief Justice. *Assign* signifies no more than a person appointed to accept; and he being authorized to require and pay, surely that is enough to empower him to receive it. The notice is shewn to be *for him*, how else could it be a request to him to do the act, which the declaration shews was made?

The payment of the money is not a condition precedent, but a concurrent act; and if the defendant had been there, the plaintiff must have laid down his money, though not so as to part with it till transfer; and so it was held in the case of *Turner v. Goodwin*.

As to the replication, consider, if the defendant says he did it on a day sooner than he was obliged, whether it is not enough to say he did not do it on the day he pleads he did; for it must be taken he had waived the benefit of any longer time.

It was spoke to a second time upon the former exceptions. And *Fazakerley pro defendente* insisted, that the plaintiff ought not to have fixed the day, but have left the defendant to his liberty of appointing which of the three days he pleased, since that time was given in ease and for the benefit of the defendant.

Sed per curiam: The demand was made to have the stock at the time most for the defendant's advantage; and if it suited his convenience to do it sooner, he might have given notice to the plaintiff. As to the plaintiff's not shewing a tender, we think that ought to come from the defendant by way of excuse, that he was there ready to have transferred, if the plaintiff or any body for him had been there to have paid the money. The notice as it is laid is well enough within the meaning of the contract, for it must be a notice left *for him* if what the declaration says be true, that notice was left at his house *requiring him* to transfer the stock. As to the exception taken on the former argument to the replication, the court did not much debate it, because admitting it ill, yet then the plea

plea was so too, and it must consequently come to be adjudged on the goodness or badness of the declaration.

The plaintiff had judgment, which was affirmed in the Exchequer Chamber and House of Lords.

Oates *vers.* Robinson.

UPON a trial in ejectment a case was made, on which the sole question was, whether after an extent upon a statute into one county, and a *liberate* returned and filed, the conusee can have any other extent into another county.

2. Whether there can be a re-extent into another county without a total eviction. 2 Will. Rep. 91.

Serjeant *Cheshyre* argued, that he might. At common law there could be no execution against lands, but in the case of the crown; and when it was given in the case of the subject, he was to extend all the lands, or else the tenant where part only was extended might defeat it by *audita querela*. 3 Co. 14. 2 Inst. 296. And where the lands lay in several counties, there was a necessity for several extents and *liberates*. Mo. 524. 2 Cro. 506.

There are many precedents before the 32 H. 8. c. 5. some where the extent went into several counties for the whole debt, Co. Ent. 296, 297. which indeed is the properest way, because the judgment is intire, and others into one county for so much of the debt, into another for another part, and into a third for the rest. Rast. 596. Dy. 162, 208. Mo. 24. 2 Cro. 246. 2 Bendlow. 59. Dalt. 29. 1 Sid. 194. 2 Roll. Abr. 469. pl. 6. 482. pl. 16. Fitzh. Execution 40. So it is plain, that before the statute 32 H. 8. c. 5. we might have had this extent.

And as to that statute, the question will be, whether it has altered the law in this respect: which it has not, because that statute gives a remedy only in the case of a total eviction, which this is not, for this is only a further carrying on and perfecting the first execution. The *scire facias* is given only to the party who is evicted out of all, but that is not the plaintiff's case, and therefore he must seek his remedy as he could by law before the statute. And in the *petty bag* there are abundance of precedents to this purpose, the practice having never been disputed till this case.

Reeve contra. I agree this case depends upon the law as it stood before the statute 32 H. 8. and I take the law to be, that it is not the return of the sheriff, but the acceptance of the party, that binds him in this case. Will any body say, that after an extent of all the

lands of the debtor in one county, a subsequent purchase of lands in the same county can be taken in? No body can say it, and yet it is certain if the purchase had been after the acknowledgment, and before the extent, it might have been extended: and why should there be any difference as to lands in another county? The rule in the *Register* 152. a. is, that in the case of extents into several counties, each must recite the award into the other county. The precedents of the debt's being divided, are an argument that if the first execution had been for the whole debt, it would have concluded the party. *Dy.* 162. 2 *R.* 2. 7. b. 15 *H.* 4. 14. b. 2 *Cro.* 338. 1 *Lev.* 92. 3 *Lev.* 269. *Lutw.* 429. In 2 *Keb.* 314. this very case is cited, and said to be ill.

There cannot be a new extent into another county, unless prayed at the time the first issued.

Per curiam, We are all of opinion, that if the prayer of an extent into the second county was entered at the time the first extent was taken out, then the second extent will be regular, otherwise not. *N. B.* Upon application to my Lord Chancellor he gave them leave to enter the prayer *nunc pro tunc*, so this court made no rule, but it went off upon proposals of going to a new trial. And the cause went down to trial, and a verdict for the plaintiff, subject to the Judge's opinion; who on hearing counsel ordered the *poslea* to the plaintiff. And a writ of error being brought, and no good bail put in, the plaintiff had his execution.

Fazakerley *vers.* Wiltshire.

Custom of the city of London that none but free porters shall carry corn, &c. good.

UPON a *habeas corpus* to the Mayor of London's court, the custom of London is returned, that the portage from any vessel on the river, and meeterage of corn, roots, &c. imported or exported, belongs to the city, upwards from *Staines Bridge* to *London Bridge*, and downwards as far as *Yendal* in *Kent*, and also another custom to make by-laws, confirmed by *Richard* the second, where any of their customs wanted *remedium congruum*.

That in the 18th year of King *James* the first a by-law was made by the corporation, " That the corn porters should be a company with twenty-four assistants, who were called free porters, who should work at a particular settled rate; and that none but the free porters should intermeddle in importing or exporting any corn, roots, &c. within the bounds mentioned in the custom, on pain of 20 s. for every offense, (except in time of danger or urgent necessity, or in the case of *bona peritura*) the forfeiture to be recovered by action in the name of the chamberlain, and four hundred porters are appointed for the future."

That

That the free porters have ever since used and exercised this by-law, till the defendant intruded by carrying of barley, though a free porter was present, *per quod forisfecit* 20 s. which the plaintiff as chamberlain is intitled *ad exigendum et habendum*, and for which he sues in the Mayor's court.

Pas. 6 Geo. it was argued by

Serjeant *Pengelly pro defendente* against a *procedendo*, and that the return be filed. 1. Because it is informal in setting out the claim. 2. Because the custom was ill. And then 3. The by-law must fall of course. Or 4. Though the custom should be good, yet the by-law is ill.

1. This is a franchise supposed to be vested in the body politick, and therefore ought to be claimed by prescription, being personal. 2 *Roll. Abr.* 579. *pl.* 2. *Hob.* 85. the difference between a prescription and custom is, that one is personal, and the other local, and to be alleged in an insensible thing, as a place. 4 *Co.* 32. 6 *Co.* 60. 1 *Inst.* 113. And the construction of them is very different, because it is sufficient if a custom is reasonable; whereas a prescription must have a lawful commencement. *Dav.* 32. 6 *Co.* 50. *b.* And it is likewise laid in an absurd manner, that they have time out of mind been called by several names, and yet claim the portage as belonging time out of mind to a body called by the present name. *Dy.* 279. Nor have they averred any interest in the port, so as to raise a merit in themselves for what they claim.

2. The custom is unreasonable, and ill.

1. Because it deprives a man of that natural right which he has to employ one he knows and can trust, and obliges him to make use of a perfect stranger whom he may not be safe in trusting. And it tends to no good end, as the preventing of fraud, because when people are at their liberty to employ any body, they will for their own sakes take care it is a trusty one.

2. Because it is not confined to the carriage of goods as a trade, but extends even to what a man brings from his own garden in the country for his private use in town. 1 *Roll. Abr.* 561. *pl.* 4. *Hob.* 189.

3. The city does not appear to be at any expence in repairing the port, so this is not a toll for the use of the port, which perhaps

haps might account for the reasonableness of its commencement. 1 *Ven.* 71. 1 *Sid.* 464. 1 *Mod.* 47, 104. 2 *Lew.* 96. *Raym.* 232. In the case of *Cudden v. Gilstrup*, *Trin.* 12 *W.* 3. upon the custom of weighing at the city beam, it was positively averred, that the city kept a key, and had proper officers for the receiving of goods.

4. Because it extends to places out of the limits of the city, and you cannot take notice what they are, as you do on a writ of error. *Salk.* 269. 1 *Ven.* 196. *Pal.* 44. By-laws will not bind out of the limits. 3 *Mod.* 158. *Jones* Sir *T.* 144. And then if it goes too far, and is void in part, it will be void in the whole; for a custom is intire. *Hob.* 189.

5. This is only a bodily labour, where no skill is required, and therefore it is unreasonable to deprive the other freemen from exercising this business by themselves, or their servants: and no length of time can make good an unreasonable custom. 1 *Roll. Abr.* 559. pl. 6. *Davis* 32. 11 *Co.* 86. 8 *Co. Wagoner's* case. In the case of the *Mayor of Winchester v. Wilks*, *Paf.* 4 *Ann.* it was held, that a right to trade could not be taken away without a consideration. *Salk.* 203.

3. If the custom is ill, the by-law will fall of course, because it is not only liable to the same objections, but to others also. For,

4. The by-law itself is ill,

1. Because it exceeds the custom, which is only *to* and *from* such places upon the river, whereas the by-law prohibits the landing, carrying up and down from one ship to another, and to warehouses near adjoining to the port. And by the clause which settles the wages, it appears they go as far as *Cheapside*.

2. It is not restrained to the carrying goods for hire, but even where the owner carries his own, which is highly unreasonable. 1 *Roll. Abr.* 364. pl. 6. *Mo.* 576, 591.

3. The merchant or the publick have no benefit by this. *Mich.* 13 *W.* 3. *Lewis's* case. An act of common council, that none should use dancing, that was not free of the company of musicians, was held void, because the party could not compel them to admit him. 5 *Mod.* 104. Here we cannot oblige a free porter to work, so this goes in destruction of trade; and such by-laws have always been held ill. *Palm.* 395. 2 *Roll. Rep.* 391.

4. The city ought not to impose a penalty for breach of their own franchise. Would not a custom that cattle depasturing upon my common should be forfeited, be held ill?

5. This is a great incumbrance to trade: the merchant is to let a meeter know his goods are ready to be landed: this is to be signified by him to one of the rulers, who is then and not otherwise to appoint a porter.

Mr. Solicitor General *contra*. The first objection goes to all the returns from the city of *London*, which are all by way of custom, as in *Wagoner's case*. This amounts to a prescription, being in the case of a body politic, which has perpetuity, and then the calling it a custom will not alter the case. The manner of claiming does not import that the city have had no more than one name at a time, for a corporation may have several; and so it is enough to say, this franchise has been in them time out of mind by either of their names. In the case of the *quo warranto*, the present name of mayor commonalty and citizens was only mentioned.

As to the merits. The general question is, whether this by-law be good, so as to support this action: and as on the one hand the court will not suffer us to usurp a jurisdiction we have not, so on the other hand it will not deprive us of any legal privilege we have.

I agree this by-law is in restriction of trade, 1. By way of exclusion of strangers, and 2. By regulation for publick convenience, both which I shall shew are proper and good. 1. The custom is good; 2. The by-law has pursued it.

1. As to the custom in restriction of trade, there are three sorts: 1. Restraints where there is no one of the trade. *Regist.* 105. 2. Only partial, where some are supposed to use the trade. *Sir William Jones* 162. 3. As to those who are expressly alleged to use the trade, which is our case, and there every member is presumed to receive a benefit. *Cro. El.* 203. 2 *Bulst.* 195. *M.* 22 *H.* 6. 14. 2 *Brownl.* 177. 8 *E.* 3. 37. 8 *Co.* 125. Which are all cases of restriction in particular districts for the benefit of persons using the trade, and yet these are as much against the common right of the publick. This custom and by-law have been tacitly allowed. 1 *Mod. Cas.* 123. *Cudden v. Eastwick* was against the employer; and there indeed it was held ill, because he could not know who was or who was not a free porter; but yet it was not disputed as to the power of appointing porters. *Salk.* 143.

1. It is objected that this restrains bodily labour, and that too in a business for which no skill is required. *Answer*: Whether it be an art or not is never the measure, but the consideration is the right of the persons, as in the case of the *Gravesend* boat.

2. It is said here is no consideration, because the city is not obliged to provide porters. *Answer*: That is implied in the nature of the custom. It is stated that their officers have done it, and that amounts to saying they have maintained officers. The defendant might have given such a matter in evidence, and it would have been a sufficient excuse. 22 H. 6. 14. the case of a mill, and in the *Gravesend* boat case there was no consideration expressed. *Co. Ent.* 641. *Raft.* 9. b. 591. *Hearn* 83. *Brownl. Red.* 63. 1 *Brown's Ent.* 68.

3. It was said here are not porters enough. This is answered by the power lodged in the mayor and aldermen to increase the number: but that is a matter of fact not before the court.

4. That the owner is restrained from carrying his own goods. *Answer*: He is not excluded, being tacitly excepted. *Pro mercede* shews it was intended only to take in the carrying by way of trade. And in *Wagoner's* case it was said that making candles to be spent in a man's own family was not prohibited.

5. They say they have no recompense. But surely this objection is very hard after so long an enjoyment, when the circumstances which first established it are forgot. There were many tenures kept on foot, though people were at a loss how to account for them. It must be supposed this was created by compact between the founders of the city and the first traders.

6. This binds strangers. Do not all exclusive customs do so? And they are no otherwise useful than as they do so.

7. They say it extends beyond the limits of the city. *Answer*: The whole district appears to be within the port of *London*. 1 *Roll. Abr.* 557. *Calth.* 115. But that will not destroy the custom. Indeed without the custom the by-law would be void, according to the cases cited, which are all of by-laws. The customs of *London* are all confirmed by Parliament, and though I agree that extends only to good customs, yet it shews of what consideration the customs of *London* are above those of other places; and a particular regard has been always had to them, as appears in *Wagoner's* case

126. 2 *Roll. Rep.* 277. This very custom is averred in the return to have been confirmed by Parliament.

2. The by-law has pursued the custom; it follows the words of it, but then it is said,

1. That the city have made themselves judges in their own cause. But are there not many resolutions in favour of these by-laws? And was there not a penalty too in the case of the city beam; and yet it was allowed, because no inconvenience would follow, since the court may judge of the reasonableness of the penalty. 1 *Lev.* 16.

2. It is said the freemen of the city are excluded. But is not this done in full common council, where their own consent is implied? And why may not they consent to part with any branch of their privilege?

3. They tell us, it binds foreigners out of the district. *Answer:* It is done by custom, and that according to *Wagoner's* case is good, even in the case of a private benefit. The by-law can only be void *pro tanto* as to what arises out of the city, as in the case of an award. 2 *Ven.* 33. This carriage appears to have been in *London*, and so within a part of the by-law that is good: and this answers another objection, that the by-law exceeds the custom, for this is no case within the excess.

The inconveniencies in this case are answered by the exception, which warrants a carrying by the non members in such cases.

The custom therefore we say is good, and well pursued by the by-law: that the further provisions will not infect what is consistent with the custom; and even those provisions will be good under the notion of by-laws for the regulation of trade: this is a case within the custom, and therefore we pray a *procedendo*.

Pengelly replied. It has not been shewn, and I rely upon it, that the merchant ought not to be obliged to employ these porters, when he has no means to compel them to attend and do the business.

Curia advisare vult. And it was spoke to this term upon some of the objections that seemed to have most weight with the court.

Wearg for the city. One objection is, that this is to restrain a man from the use of his bodily labour, to which every one has a natural right. But is not the custom to restrain the exercising a trade by one not free allowed, and is not this more reasonable? If a
man

man is not to use an art which he has been seven years in learning, and perhaps not able to turn his hand to any thing else, surely he may be restrained from one sort of bodily labour, and apply himself to another.

But the great objection is, that the custom as here laid extends itself out of the city. It does indeed appear to go beyond the walls, but what we rely upon is, that the liberties of the city and their superintendency on the river of *Thames* extends from *Staines Bridge* to *Yendal*. 14 E. 2. *Lib. regum antiquorum* 256. cited in *Stow* 35. It appears the justices in *Eyre* sitting in *London* took cognizance of a matter arising upon the river of *Thames*; the defendant pleaded to their jurisdiction, *et justiciarii dixerunt quod aqua Thamesiae pertinet ad civitat' London usque mare, et si velit respondeat.* 9 E. 4. p. 2. m. 7. It appears the King had granted to the Earl of *Pembroke* power to build a wear in the *Thames*, but upon complaint of the city it was repealed, with this declaration, *quod de antiquo jure habent cives London supervisum et gubernationem aquae Thamefis ad pontem de Staines.* *Stow* 37. makes mention of them, and the records themselves are so. 1 *Roll. Abr.* 557. the very limits now in question are declared. And in *Scaccario*, 3 Jac. 1. Ro. 89. Co. Ent. 535. The Attorney General confesses the claim of the city to a jurisdiction on the *Thames* between *Yendal* and *Staines Bridge*.

The claim is confined to the port of *London*, which is an averment, that the port extends so far, and the court will intend the port to be part of the city, as in the case of a bridge it has been done. 1 *Lev. Bernard v. Bernard*. The custom of the city that their traders may set up in any part of the kingdom extends beyond the city, and yet that has been allowed. 1 *Mod.* 79. 1 *Saund.* 311. The case of the *Gravesend* watermen extends all the way between that town and *London*.

C. J. I am of opinion that both the custom and by-law are good, notwithstanding the objections that have been taken: I shall not go over them all, because the opinion of the court has been given as to some of them upon the former arguments.

A custom to restrain trade in a particular place is good; and surely much more so, where the restraint is only from bodily labour in one instance, than where it prevents a man from exercising an art he has been a long time in learning. I think the custom is good, as it is a convenience to the publick, and that there is an equivalent by the obligation the city is under to provide porters; if they do not, I am of opinion an action will lie, as in the common case of a ferry; neither is the merchant obliged to rely on an
action

action only, for he may certainly employ who he pleases if the free porters do not attend. The convenience to the merchant is very great, in having persons ready to assist him as soon as he comes into port, and so he is not obliged to go and search for porters who are strangers to him.

As to the objection about the extent, I think it is fully answered by the ancient records that have been cited, and above all by the confession of the Attorney General, which is of more weight than any of the rest; since it cannot be imagined that the King's Attorney would confess a jurisdiction against the crown, which the city had not the clearest right to. We must take the port to be within the limits; or if it went beyond the limits of the city, yet I do not see how this case can be distinguished from that of the *GraveSEND* watermen. The custom of meetage extends as far, and yet that has never been questioned upon this account.

There is no doubt but a by-law may be good in part, and void for the rest; for where it consists of several particulars, it is to all purposes as several by-laws, though the provisions are thrown together under the form of one. I am of opinion there ought to be a *procedendo*. *Powys J. accord*'.

Eyre J. The reasons on which the other customs of meetage and weighing at the city beam have been allowed, will support this; because an action will lie, if the city do not provide porters. Corporations or publick bodies are presumed to discharge their duty in cases of this extensive nature better than any private persons can. *Et per Fortescue J.* If this was an inconvenient custom, it would have been complained of before so long an enjoyment. The case of carts was allowed, to prevent nuisances; and we may put this upon the same foot. In *Cudden v. Eastwick* the custom was allowed, and only determined, that it was ill to lay a penalty upon the merchant. I think it is enough to say, that it does not appear that this custom extends itself out of the port, though it is plainly confined to it, and we must take notice of the extents of ports. Does not the custom for trying felonies committed in *Middlesex* at the *Old Bailey* extend itself through the whole county of *Middlesex*? *Per curiam*, There must be a *procedendo*.

Trin. 2 Geo. 2. Robinson v. Webb the same return was made, and upon my motion a *procedendo* was granted without argument, the point having been settled the same way in *C. B.* on a solemn argument. *Paf. 13 Geo. 1. Ludlam v. Bradley.*

Michaelmas Term

8 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Dominus Rex vers. Inhabitantes de Warminster.

A person ir-removable needed not give notice before 3 & 4 W. & M.

Certiorari to remove an order of two justices may be directed to the sessions, and returned by them.

THE sessions return an order of two justices for the removal of *J. S.* whereby it appeared, that after the statute 1 *Jac. 2. c. 17.* and before the 3 & 4 *W. & M. c. 11.* *J. S.* had been hired into the parish of *Warminster*, and had lived there as a servant for forty days, which the two justices adjudged had gained him a settlement. And now Mr. *Fazakerley* moved to quash the order, because it did not appear, that *J. S.* had given notice, and the statute of 1 *Jac. 2.* is express, that the forty days are to be accounted from giving notice in writing; and besides the *certiorari* should have gone to the two justices and not to the sessions, because it did not appear any act had been done at sessions, either to confirm or reverse the order. As to this last matter the court held that the order was well returned by the sessions. And Mr. Justice *Eyre* said, it had been so determined already, for the justices are supposed to return all the orders they make to the sessions, where they are to be recorded. And as to the other part of the case, it was held well enough

enough without notice, for the intent of that was only to give the parish an opportunity of sending away persons that were removable; but that is not the case of hired servants or apprentices who are irremovable; so that requiring them to give notice, is requiring them to do a vain thing, for as to themselves it can be of no benefit in making it a better or a stronger settlement, and as to the parish, they can do nothing upon it either to ease or discharge themselves.

Between the Parishes of Chewton *and* Compton Martin.

TWO justices make one order for the removal of two different families, and the sessions upon appeal quash the order for insufficiency: and to maintain the order of sessions *Reeve* objected to the order of two justices, that though the parishes are the same in both cases, yet the removal of two families by one order is ill: for suppose the removal of one is legal, and the other illegal, and there is an appeal to the sessions as to both, and the order is confirmed as to one, and reversed as to the other; what is to be done in that case as to costs, the statute of 8 & 9 W. 3. c. 30. giving costs to the parish in whose favour the appeal is determined, and now the appeal will be determined in favour of neither, and of both; it cannot be said that the order is reversed, because it stands good as to part, and it cannot be said to be confirmed, because it is not held good as to the whole.

Though the parishes are the same, yet different persons cannot be removed by the same order upon independent settlements.

Eyre and *Fortescue* Justices were of opinion, that the order was ill, giving this further reason, that the party removed had a right to appeal, for it may be he was removed from his own estate, and then upon his appeal it will consequentially draw over the other matter in which perhaps the parties on all sides acquiesce. The Chief Justice said he had not fully considered it, but his two brothers being clear that the order of the two justices was ill, and the counsel for maintenance of that order refusing to refer the whole matter to the judge of assize, he pronounced the rule, That the order of sessions should be confirmed.

Vicars *vers.* Worth.

THE wife libelled in the spiritual court for words which appeared on the libel to be spoken in *London*: the words were (speaking to the husband) "You are a cuckoldly old rogue, and" "was cuckold by a porter." And against a prohibition *Lut.* 1039. was urged, that the custom of *London* extends only to the word

Words tantamount to where are within the custom of *London*.

whore,

whore, and words that only import a woman to be so, are not within the custom. *Sed tota curia contra*; for prohibitions have been often granted where the words are tantamount; *Batchelor v. Dennis*; *Evans v. Jones*, 3 *Annae*, *Pasch.* 1 *Geo.* in *B. R. Kilburn v. Podger*. And in the principal case a prohibition was granted.

Dominus Rex vers. Caywood.

The *praemunire* clause in the bubble act leaves a power in the court to moderate the judgment.
6 *Geo* 1.
c. 18. §. 18, 19.
Ld Raym.
1361.

THE defendant being convicted upon the late act of Parliament of being the projector of an unlawful undertaking to carry on a trade to the *North Seas*, whereby many of his majesty's subjects had been defrauded of great sums of money, came now to receive the judgment of the court, which was prayed by Mr. Attorney General upon the statute of *praemunire*; whereupon the counsel for the defendant argued, that the late statute had not tied up the hands of the court from pronouncing any milder sentence, if any favourable circumstances could be laid before them, but had left a discretionary power in the court to punish, as (the words are) for a common nuisance; and if they thought fit, that then the party should likewise incur *any* of the pains and penalties ordained by the statute of *praemunire*. And if it should be taken otherwise, it could be to no purpose, that the first clause of fining for a common nuisance was inserted, when the judgment of *praemunire* alone would reach every thing that the party could have, to answer any fine.

To this it was answered by Mr. Attorney and Solicitor, that the whole judgment in a *praemunire* might stand, and yet there might still be some use for the clause about nuisances, where part of the judgment might be to abate the nuisance, and the party convicted may be likewise set on the pillory or whipped, which is no part of the judgment against one convicted upon the statute of *praemunire*. And they said the word *any* in the statute was the same as all; if he is to incur *any* of the pains and penalties, that is *every one*.

Pasch 10 *Geo.*
he was fined
5 *l.* and im-
prisoned du-
ring the
King's plea-
sure.

Adjournatur. And the last day of the term the Chief Justice declared the opinion of the court, that they had a discretionary power to inflict all, or only some, of the penalties of a *praemunire*.

Dominus Rex *vers.* Mendez.

UPON exhibiting articles of the peace against the defendant, it was objected by Mr. *Wearg*, that the fact whereon the prosecutor grounds his apprehensions of danger appeared to be committed before the act of grace, and pardoned thereby; and the crime by that being gone, it must be considered as never done; and the court never demands security of the peace barely on a man's swearing he goes in danger of his life, without laying some fact before the court, that it may appear to be such a *metus, qui cadere possit in constantem virum*.

A fact committed before the act of grace may be a ground for articles of the peace.

Sed per curiam: Suppose it was threats only, would not they be a ground for articles, tho' they are not punishable? Though the fact is pardoned, yet it may be instanced for an inducement to us to believe the defendant a dangerous person. The defendant entered into a recognizance to keep the peace.

Edwards *vers.* Carter et al'.

THE defendant and another were partners in the trade of a brewer, and the plaintiff supplied them with malt, for which they neglecting to pay, the plaintiff sued out a bill of *Middlesex*, and arrested *Carter*, who at the return of the writ put in bail before a judge; but the other partner could never be arrested: whereupon the plaintiff, without taking any notice of the proceedings upon the bill of *Middlesex*, takes out an original against both partners, and outlaws them. And now *Strange* moved, that the outlawry as to *Carter* might be reversed at the plaintiff's expence, because he had proceeded to outlawry against one that was present in court.

Where the process is against two on a joint cause of action and one only appears, the other must be outlawed before there can be any further proceedings.

Upon the motion the court made a rule to shew cause; and said it was such a contempt, that they ordered an attachment *nisi*. And *Wearg pro quer'* coming to shew cause insisted, that the other defendant not appearing upon the bill of *Middlesex*, it was impossible for the plaintiff to go on upon it with any effect; and as to taking the original against both, that was necessary, because it was a joint contract. *Sed per curiam*, Though you could not proceed on the bill of *Middlesex*, and though it was necessary to join the other, who could not be arrested, with the defendant, in the same original, yet you could not go on to outlawry against him: you should have outlawed one onely, and then you might have come and declared upon

the original, that *Carter*, together with *A. B.* his late partner *assumpserunt super se*; but the proceeding here is altogether irregular, because the party was in court, and had done every thing in his power to put the plaintiff in a fair way of recovering his debt: he could not appear or file bail for the other partner, because an action would lie against him for doing it without authority. The court ordered the outlawry to be reversed, and the plaintiff to pay costs, on the defendant *Carter's* appearing to the original, and discharged the attachment part.

Greenhouse *vers.* Cleever.

Where the defendant is in custody the declaration must be delivered to the turnkey and not into the office.

THE defendant being in custody for want of bail, after the second term moved for a *superfedeas* for want of the plaintiff's declaring, which was opposed by Mr. *Reeve*; because though no declaration had been delivered to the turnkey according to 4 & 5 *W. & M. c. 21.* yet there had been one left in the office in time, and this he said would be enough to prevent the defendant's discharge, though he could not be obliged to plead to it, or let the plaintiff take a regular judgment. And of this opinion was the secondary, who informed the court, that a *superfedeas* is never granted, till the clerk of the declarations has certified there is no declaration against him in the office; which certificate would be useless, if the delivery of a declaration into the office be not sufficient to prevent a discharge upon common bail. But the court upon consideration granted a *superfedeas*, taking the delivery of a declaration to which the defendant was not obliged to plead, and on which the plaintiff could not sign a regular judgment, to be no delivery at all.

Dominus Rex *vers.* Jones.

Where a conviction of forcible entry is quashed, the court must award restitution.

A Conviction of forcible entry was quashed for the old exception of *mesuagium five tenementum*; but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction. The court said, they had no discretionary power in the case, but were bound to award restitution on quashing the conviction.

Dominus

Dominus Rex *vers.* Cleg.

AN order of bastardy was made at sessions, (which was admitted to have original jurisdiction) and Mr. *Denton* objected, that it was not said the defendant was ever summoned or appeared, and natural justice required that he should at least have an opportunity to defend himself.

Where an order of bastardy is made originally at sessions (as it may) 2. If a summons should not be set out.

C. J. I believe these orders made originally at sessions are very rare, the usual way being to bring the matter before the sessions by way of appeal from the order of two justices. Now if it should be taken, that the order of two justices will be well enough, without their shewing a summons or appearance; yet I think this case will fall under a very different consideration. For in the other case the party has an opportunity to relieve himself by appeal, whereas upon an original order at sessions he can have no opportunity to bring the matter to a farther examination; so that it is but a lewd woman's going behind his back and swearing a bastard upon him, by which means the most innocent man in the world may be condemned. In the case of the *Queen v. Simpson*, it was long debated, whether there ought not to have been a personal appearance of the deer-stealer; at last indeed it was determined, that a summons was sufficient, but it was never offered to be supported upon the foot of not shewing a summons. So far from it, that exceptions were taken to the manner of the summons, and the court delivered a special opinion as to them. *Ante* 44. *Lord Raym.* 1406.

Eyre J. (*absente Powys*). It not appearing this order was made in the absence of the party, I think we must take it to be a regular proceeding. And so it was held in the case of the *King v. Peckham*, *Carth.* 406. The court said, where a summons was necessary, they would presume there was one, unless the contrary appeared; for all jurisdictions are presumed *prima facie* to act according to law.

Fortescue J. It is certain, that natural justice requires, that no man shall be condemned without notice; for which reason I think the order will be good, because it does not appear to us that he had no notice: are we to suppose the sessions have proceeded contrary to right and justice, and that too in a case where they have undoubted jurisdiction? In the case of servants wages the jurisdiction is given only in husbandry, and yet orders have been held good, where it did not appear the service was in husbandry; for the court said they would intend it so, unless the contrary appeared. *Salk.* 442.

C. J. I do not see to what purpose we exercise a superintendency over all inferior jurisdictions, unless it be to inspect their proceedings, and see whether they are regular or not. I have often heard it said, that nothing shall be presumed one way or the other in an inferior jurisdiction. And as to the case of wages, it was always wondered at, and in my Lord *Parker's* time it was actually contradicted in the case of the *King v. Helling*, ante 8. *Adjournatur. Trin. 12 Geo.* it was moved and confirmed without opposition.

Pitt *vers.* Coney.

On error in
action *sur*
bottomree
bond there
must be bail.

THE plaintiff recovered on a bottomree bond, and the defendant brought a writ of error, but put in no bail; and the question was on the words of the statute, which are, *bonds for the payment of money only. Et per curiam*, The contingency having happened, this is now in every respect a bond for the payment of money only, and therefore there must be bail.

Between the Parishes of Wookey and Hinton Blewet.

Where a person settled in
A. has an estate descended
to him in
B. he cannot
be sent thither; though
if he was there
he would be
irremovable.

A Person settled at *Hinton Blewet* had an estate descended to him in *Wookey*, whereupon the justices send him thither as to the place of his last settlement. *Et per curiam*, The order quashed, for it is no settlement nor inhabitation, though if he should go thither he could not be removed: it may be a great injury to send him away from a good trade in *H.* to perhaps half an acre of land wherein he has but a term.

Between the Parishes of Landinaboe and Much Birch.

Where a woman with
child of a bastard is re-
moved from
A. to *B.* and
privately re-
turns to *A.*
and is there
delivered, the
settlement of
the bastard is
in *B.*

ORDER for removal of a female bastard child from *Landinaboe* to *Much Birch*, wherein the fact is stated specially, that *Mary Wells* had been lately removed from the parish of *Landinaboe* to *Much Birch* aforesaid, being the place of her legal settlement; and that soon after, she of her own accord did secretly return to the parish of *L.* from which she was removed, and has been there since delivered of a female bastard child, which at the time of her removal she went with: and the justices send the bastard to *M.* the settlement of the mother.

Fazakerley moved to quash the order, upon the general ground, that a bastard is settled at the place of its birth. Which was opposed by *Strange*, who cited *Trin. 1 Geo. between the parishes of Tottenham and Newton Longville*, where a bastard born at *A.* pending an illegal order of removal, was sent back with the mother upon reversal, and adjudged that the bastard should follow the settlement of the mother. So is *Salk. 474, 532. 2 Bulst. 349. Et per curiam, (absente C. J.)* That case will govern this, and therefore the order must be confirmed.

N. B. This case was never well considered, for it went off without any debate, upon the answer given by the cases which I cited, and which seem to differ widely from the present case; for those cases were all adjudged upon the apparent fraud, in illegally removing a woman big with child of a bastard; and lest the parish should take advantage by their own wrong: but in the present case, it is stated that she returned of her own accord, which makes it no more than the common case of a bastard born in the parish of *A.* when the mother is settled in another parish; which settlement of the mother was never thought to be the settlement of the bastard. And I do not see that it makes any difference, that she returned to the parish from whence she was removed, any more than if she had rambled into any other parish.

Elwood *vers.* Sir Godfrey Kneller.

ON a reference to the master, he informed the court, that it was necessary one Mr. *Holbeck* should attend him: and upon this the court was moved for a rule, which they were very tender of granting at all, but at last they made a rule, that he should shew cause, why he could not attend the master.

Rule for one not party to the suit to attend the master.

Combes *vers.* Blackall.

DEBT upon a bond, *non est factum* pleaded, and verdict and judgment *pro quer.* To a *scire facias* on this judgment the defendant pleaded bankruptcy, and that the cause of action accrued before: and on the trial it appeared, the bond was given before the bankruptcy, but the judgment was after: and the Judge who tried the cause being of opinion against the defendant, there was a verdict for the plaintiff. And now in an action of debt upon the judgment, Serjeant *Birch* moved, that the defendant might be discharged

Where the defendant might have pleaded bankruptcy in the first action, he shall give bail in debt upon the judgment.

discharged upon common bail, because the bond, which was the foundation of the demand, was before the bankruptcy. *Sed non allocatur.* For *per curiam*, We can look no farther backward than the judgment, and therefore there must be bail.

Dominus Rex vers. Lister.

Power of the husband over his wife.

THE defendant married the lady *Rawlinson*, and they disagreeing, a deed of separation was executed, whereby some part of her fortune was made over to him, and the rest settled for her separate maintenance. In pursuance of this agreement they lived separately for some time, till Mr. *Lister* thought fit to seize on her, as she came out of church, and hurried her away to a remote place, where he kept her under a guard, till her relations found her out, and brought a *habeas corpus*, by virtue of which she came before the court. And all this matter appearing, and that he declared he took her into his power, in order to prevail with her to part with some of her separate maintenance; the Chief Justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company; it is lawful for the husband, in order to preserve his honour and estate, to lay such a wife under a restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty: that there was no colour for what he did in this case, there being a separation by consent. And therefore they discharged the lady from her confinement, and being desired to bind the husband from attempting the like for the future, they refused to do that; but however intimated to him that they should bear a heavy hand over him, if he acted contrary to the declared opinion of the court. *In F. Burr. 542. Rex v. Mary Mead*

Smallwood vers. Vernon.

The charge against the indorser may be laid *secundum tenorem* of the indorsement, against the drawer *secundum tenorem billae*.

CASE by original in *B. R.* and declares against the defendant as indorser of a promissory note, and after setting out the note and indorsement, he goes on, that *virtute inde* the defendant became chargeable with the payment of the money *secundum tenorem* of the indorsement. The defendant upon oyer of the original, pleads in abatement, that the charge against him ought to be according to the tenour of the note, and not of the indorsement. And *Strange pro def.* insisted, that it might be, that the indorsement appointed the money to be paid at a different time from what is mentioned in the note; which are terms that the indorser cannot lay upon the party who made the note. Suppose the note be payable

able 1 *May*, surely the party to whom it is given cannot say, I appoint the contents of this note to be paid to J. S. upon 1 *April*. Or if he should, yet the other will not be bound to pay it till *May*. And if he is charged according to the terms of the indorsement, his only remedy must be, to traverse the being charged otherwise than according to the tenour of the note. And as to the objection, that in counts upon promissory notes there is no occasion to lay any express *assumpsit*, and therefore the whole may be rejected; he answered, that where the pleader does not rely upon the first part of the case he makes, but goes on further and alleges other matter, he by that gives the other side an opportunity of traversing the last matter; as *Lutw.* 108.

Sed per curiam, There is no occasion to pray in aid of that objection here, where the action is against the indorfor; it is true he cannot lay a charge upon the giver of the note in a manner different from the terms of it; but he may charge himself if he pleases, for every indorsement is the same as making a new note; and if the note be payable 1 *May*, and the indorsement appoints it to be 1 *April*, as to the indorfor this is a promissory note payable 1 *April*. If this was an action against the giver of the note, there might be more in the objection. *Respondes ouster agard.*

Preston *vers.* Lingen.

IN ejectment on the demise of Lord *Coningsby*, the plaintiff moved on the common affidavit of value, for a trial at bar, which was opposed by the defendants on another affidavit, that they severally held but small parcels of lands by different titles: and this is putting it in the power of the plaintiff, by joining several together, to bring the owner of but 5 *l. per ann.* to the bar. *Sed per curiam*, There must be a trial at bar, for if the plaintiff makes but one title to the whole, he has a right to join them all together. It was moved that the lessor, having privilege, might name a good plaintiff to be liable to costs; but the court denied it with some resentment, saying it had been often attempted, and as often refused.

Trial at bar;
where grant-
able.

Anonymous.

ON a motion for an attachment, the Chief Justice declared, that all the Judges (on consideration) had resolved, that the Sheriff could not take bail on an attachment, but a Judge at his Chamber might.

Sheriff cannot
take bail on
an attach-
ment.

Mich. 13 *Geo.* *Rex v. Bentley.* Resolved accordingly.

Cary

Cary *vers.* Webster.*At Guildhall coram Pratt C. J.*

Where money is paid to the servant and he misapplies it, the party has his remedy against the master or servant at election.

THE defendant was a clerk of the *South-Sea* company, and took in the payments on the third subscription: the plaintiff paid him 600*l.* and he by mistake never entered it in the book, but however paid it over to the company. And the Chief Justice ruled, that no action would lie against him. That if he had not paid it over, the plaintiff would have had his option, either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because till the money is paid over the servant receives it to his use; or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

Atwood *vers.* Dent.*In Middlesex coram Pratt C. J.*

The party who excepts to a witness may call him afterwards.

THE plaintiff called a witness, who was set aside upon an exception taken by the defendant. But afterwards the defendant himself thought fit to call him, and then the plaintiff opposed his being examined. But the Chief Justice ordered him to be sworn, for he is a good (nay a better witness) *for* the defendant, though he is not to be admitted against him.

Dickenson et ux' *vers.* Davis. Ibid.

In an action by husband and wife, the defendant on the general issue shall not be admitted to controvert the marriage.

TRESPASS by husband and wife, for an assault on the wife, and on Not guilty the defendant would have given in evidence, that the man had a former wife still living, and then the defendant could not be guilty of such a beating for which the plaintiff was intitled to damages; and Not guilty does not go barely to say I did not beat this woman, but I did not beat the plaintiff's wife. *Sed per Pratt C. J.* I can never allow it: you might have pleaded this in abatement, and then they would have had an opportunity to meet you upon that question; whereas if I was to let you into it now, the honestest couple in the world may be branded for adulterers.

Moody *vers.* Thurston.

At nisi prius in Middlesex coram Pratt C. J.

BY the act for stating the debts of the army, the commissioners have power to call the officers and agents before them, and if it appears there is any money due from one to the other, the commissioners are to give the party a certificate, and he may maintain an action for the money as upon a stated account. The plaintiff now produced his certificate; and the defendant offered in evidence his accounts, by which he said it would appear, he had at that time no money in his hands: and besides, the commissioners had never heard him, but on the first summons made the certificate, and refused to give him time to produce his accounts. But the Chief Justice would not let him into this evidence, being of opinion, that the certificate was conclusive.

Act of the Commissioners for stating the debts of the army, conclusive evidence.

Hil. sequen' on a motion for a new trial they were all of the same opinion.

Dominus Rex *vers.* Gray.

At the Old Bailey.

ONE of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape: and C. J. King ruled it to be burglary, and the defendant was convicted, and transported.

Burglary.

Kelyng 67.

Dominus Rex *vers.* Vincent et al'. Ibid.

INDICTMENT for forging a will relating to personal estate; and on the trial a forgery was proved, but the defendants producing a probate, that was held to be conclusive evidence in support of the will.

A will relating to personal estate cannot be said to be forged, after probate granted.

Dominus Rex *vers.* Burton. Ibid.

THE defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman; and King C. J. *de C. B.* ruled it to be but manslaughter.

Manlaughter.

Statford *vers.* Neale.

Pas. 3 Geo. rot. 183.

In prohibition
the contempt
is but form,
and the jury
need not give
any verdict
about it.

ERROR on attachment *sur prohibition*, wherein the plaintiff declares, that by the laws of *Ireland* no tithes ought to be paid twice in one year, or for cattle fed with hay whereof tithes have been paid, or for stubble, &c. That he was seised of certain lands for which he had paid tithes, and yet the defendant libelled against him, as being rector, and intitled to two thirds of the tithes of certain bullocks and horses depastured upon the land, for which tithes had been paid as aforesaid; and that he was proceeding against him, though he had alleged all this in his defence.

The defendant as to the contempt pleads Not guilty, upon which issue is joined; and for a consultation, that as to two intire parts of the tithes of the agistment of those lands he is intitled to them as rector, and therefore libelled; and traverses, that for all the time aforesaid the cattle were fed with hay for which tithes had been paid, and only in meadows that had been tithed: upon which issue is joined and found with the defendant in the words of the traverse: on this the King's Bench in *Ireland* award a consultation, upon which error is brought, and the general errors assigned.

Mr. Solicitor General *pro querente in errore* took several exceptions.

1. That the traverse to the merits of the suggestion was immaterial, for it ought to have been to the refusal of the plea, which is the foundation of sending the prohibition, and it is not any want of jurisdiction. 2 *Co.* 45. a. *Cro. El.* 511. The Judge below might have tried whether the beasts were fed with hay of which tithes had been paid.

2. If the matter was properly traversable, yet the traverse is too narrow; for it is, that during *all* the time they were not so fed, and so is the verdict, whereas they should have answered to every part of the time. 2 *Townsh. Jud.* 174. *F. N. B.* 54.

3. The traverse is a negative pregnant, that the beasts were not fed with hay that had paid tithes and only in meadows which had been tithed that year; all in the conjunctive, whereas these being several matters ought to have been separately traversed. 1 *Roll. Abr.* 640. pl. 12, 13, 14. *Yelv.* 86. It amounts only to saying both facts

facts are not true, but yet one of them may. A negative pregnant is a denial with an insinuation of another affirmative, as *ne dona pas per le fait* implies a parol gift. *Cro. Jac.* 505, 560. And this exception goes likewise to the verdict, for that finds both the same way; when if one was true, the plaintiff will be excused. *12 E.* 4. 6. *Bro. Issue* 39. And the difference lies between the affirmative and negative proposition.

4. There is no verdict as to the issue upon the contempt, which is a discontinuance. *1 Roll. Abr.* 801. *pl.* 4. 802. *pl.* 7. And it is not barely an imperfect verdict. *3 Lev.* 55. Trespas for a coat and mantle, and a special verdict as to one, and none as to the other; held ill. *Co. Ent.* 459. the precedent is with the objection.

5. The defendant in his plea does not go for a consultation as to every thing in the libel; whereas the consultation is awarded generally for the whole. *1 Book of Judg.* 97. *Ash.* 376. *2 Townsh. Jud.* 107, 172, 173, 174. *Vid.* 61. *5 Co.* 66. *Jeffries's case.*

6. After the judgment *quod nil capiat per billam*, there is no *eat inde sine die*. *1 Roll. Abr.* 771, 772. *pl.* 26. *Cro. Jac.* 439. *1 Keb.* 488. *1 Book of Jud.* 102.

7. The quantity demanded in the plea is uncertain, being for two intire parts, but does not say whether thirds or tenths. Now that ought to be certain, for the plea is in nature of a count, being a suit for a consultation.

Chesbyre Serjeant contra. 1. We have followed the words of the allegation, as to the refusal of the plea. *2 Co.* 45. says, it is but form, and not traversable.

2. I did not hear the answer.

3. The traverse is in his own words, and we could not divide them by several traverses.

4. In the case of trespas there never is any verdict as to the *vi et armis*. *1 H.* 7. 19. *Salk.* 346. And in the case of *Sumner v. Aeton in Scaccario* I took this very exception in trespas, and it was over-ruled; and yet that is in a point material, because the King is intituled to his fine of 6 s. 8 d.

5. The general award of a consultation can only go to what is covered by the plea.

6. *Eat*

6. *Eat inde sine die* would not be proper, because there may be another prohibition. Nor is it necessary here, where the plaintiff claims nothing.

7. The incertainty in the quantity is nothing in the temporal courts: their proceedings below are more loose than ours; they libel for words *et eis simil'*: for such a sum of money, *aut eo circiter*. 2 Lev. 193. 2 Roll. Abr. 298. 2 Lev. 173. 1 Mod. 182. Fine for two parts of a manor. 1 Leon. 115. And 13 Co. 58. explains it that two parts are two thirds, three parts three fourths, &c.

Mr. Solicitor General. The case of trespass is different, for there finding the justification is a denial of the force, but here a verdict upon the merits is no denial of the contempt.

C. J. The incertainty of the demand in their proceedings is no objection in a case within their jurisdiction, as to which their law is the rule. The refusal of the plea need not be traversed; the material point being, whether tithes are payable or not. I think the traverse good, in denying it as the plaintiff alleges it, but there does seem to be a difference between the case of a trespass and the contempt.

Eyre J. In demurrers the contempt is never answered, for that is but form, and of a modern introduction, it being the course before Queen Elizabeth's time to sue out a *scire facias quare non fieret breve de consultatione*. Co. Ent. 452. 2 Co. 46. *Archbishop's case*, has no *eat inde sine die*; nor can it be necessary, because *inde* would refer to the contempt, and that is only matter of form.

Fortescue J. I think the incertainty is no objection, and as to the contempt it is but form, and the jury is never charged with it.

Adjournatur. And this term

Reeve pro querente in errore, waiving all the exceptions which on the former argument the court inclined had nothing in them, mentioned only three, which he insisted on.

1. The praying a consultation for two integral parts, without distinguishing whether thirds, fourths, &c.

2. The plea extends to lands not mentioned in the libel, so the award of a consultation *in hac parte* goes to the whole; and a consultation cannot be granted for a matter not in suit below.

3. But the objection he principally relied upon was, that there was no verdict as to the issue joined upon the contempt. It must be agreed, that if the verdict does not go to all the material points put in issue, it will be error, 3 *Lev.* 39, 55. (which the court agreed) then the nature of this contempt is to be considered. In a prohibition both parties are actors, the plaintiff for damages, and the defendant for a consultation, and no body can say but the proceeding after a prohibition is a damage, an injury to the plaintiff. 1 *Cro.* 559. 1 *Jon.* 447. 2 *Roll. Abr.* 516, 575. And therefore in 1 *Vent.* 348, 350, 362. 2 *Jon.* 128. a judgment was reversed for want of alleging a *venue* where the proceeding was, and *Jones* cites two precedents, *Pasch.* 3 *Car.* 2. and *Pasch.* 22 *Car.* 2.

Pengelly Serjeant *contra.* When two parts are demanded, it cannot be understood otherwise, than that one only remains. It is allowed in ejectment, 1 *Leon.* 115. 1 *Mod.* 182. 13 *Co.* 58, 59. In fines and *formedons*.

2. The consultation can go only to what lands are comprized in the libel, and therefore *in hac parte* is confined to that; or if it should go farther, yet as it can give no new authority to the court below, it signifies nothing. *Hob.* 119.

3. As to the contempt, every body knows it is but form; and like the case of the *vi et armis* in trespass. 1 *Saund.* 81. *Parl. Cas.* 201. where the cause is determined on a demurrer, there never was any instance of inquiring into the contempt. 1 *Townsh. Jud.* 101, 102, 103, 105, 106. *Rast.* 491. 1 *Saund.* 140, 143. *Co. Ent.* 456. a. 457. b. 467. a. *Lutw.* 1072, 1043, 1052. 2 *Townsh. Jud.* 172. 2 *Co.* 43. *Cro. Eliz.* 512.

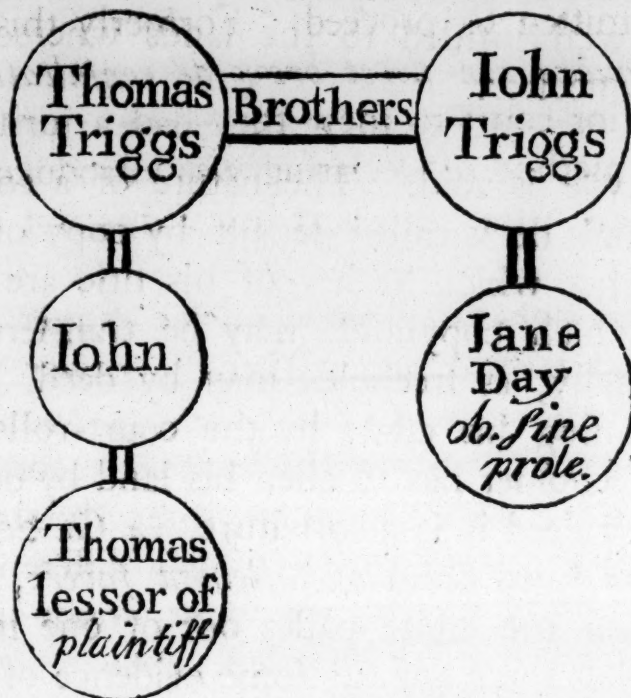
Chief Justice. The general rule laid down is certainly right; that it will be error, if the verdict does not go to all the material parts of the issue: and therefore the question is truly stated, whether this be material or not. Now as to that, consider what is the design of the party's declaring in prohibition; it is only to see whether the court below ought to proceed farther, and not whether they have proceeded; for that is a matter alleged for form sake, that there may be a demand of damages, to give it the requisites of a suit in law; but in fact we all know it is a fiction, for they never proceed after the first motion, and we must take notice of the course of proceeding: besides if this exception should prevail, it will avoid almost every judgment in prohibition. As to the other two objections, I think there is one answer for both; that upon the whole it appears,

the court below ought to proceed upon the libel, and the consultation doth not enlarge their jurisdiction. *Powys Justice accord.*

Eyre Justice. The only point in prohibition is, whether the court below shall be admitted to proceed. Formerly this was determined by a *scire facias quare non fieret breve de consultatione*, and then it lay upon the inferior court to shew they had a jurisdiction. But in case of them this method of declaring was introduced, and that puts the plaintiff to shew, that the court below has not a jurisdiction.

The consultation does not depend on the prayer of the plea, but upon the libel, and is only giving them a power to proceed upon the libel, without any regard to the pleadings upon the declaration. As to the contempt, it is merely fictitious, for does any body think we would not punish the judge if he should proceed? The case where no *venue* was alleged is widely different, for there the point was tried; and if they do try it, no doubt it must be in the same manner as all other issues are tried.

Fortescue Justice. I do not think *duas partes* are two thirds, they may as well be fifths. But the true answer is, that the libel is two thirds. And it matters not what the party prays in his plea. In *Co. Ent.* there is a precedent, where the judgment is *quod fiat consultatio*, and that the judge shall proceed *in ista causa*. The same answer serves for the supernumerary lands. As to the contempt, I concur with the rest, for since the precedents are both ways, we must adhere to them which tend to support the judgment. The judgment affirmed.

Smith *vers.* Triggs.

UPON Not guilty in ejectment for copyhold lands in *Middlesex*, a case was made at *Nisi prius* for the opinion of the court.

That *Hugh Hunt*, being seised in fee of the premises in question, married *Jane* the widow and relict of *John Triggs* the lessor of the plaintiff's great uncle. That after the marriage *Hugh Hunt* surrendered the premises to the use of his will, and afterwards devised the same to *Jane* his wife and her heirs, and died without issue by her; after whose death *Jane* was admitted and likewise surrendered to the use of her will, and devised the same to *Jane Day* her daughter and heir by her first husband *John Triggs*, and to her heirs for ever, and soon after died. That *Jane Day* before admittance made her will, and thereby gave the premises to the defendant in the words following; "Item I give and bequeath all my freehold and also all my copyhold estate, which I intend to surrender to the use of this my will, lying in *Edmington* in the county of *Middlesex*, unto my cousin *Thomas Triggs* (the defendant) for and during the term of his natural life, with remainder over. That after making the will, and before any court day, *Jane* the devisor died, having never surrendered to the use of her will; but the defendant who is the devisee is notwithstanding admitted under the devise.

A copyholder *ex parte materna* devises to his heir, who dies before admittance: the lands remain descendible to the heir on the part of the mother.

The lessor of the plaintiff claims the lands as cousin and heir of *Jane Day*, (*viz.*) as grandson and heir of *Thomas Triggs*, elder brother of *John Triggs*, father of the said *Jane Day*. And the defendant claims under the devise.

Short

Short pro quer' argued, 1. That the devise by *Jane Day* to the defendant is void for want of a surrender to the use of her will, and, 2. That the lessor of the plaintiff, who is heir at law to *Jane Day* is therefore well intitled to the lands whereof no disposition was made by his ancestor.

1. That the devise is void. The nature of a copyholder appears in 1 *Inst.* 57. *b.* and he is called tenant by copy of court-roll, because all the evidence which he has of his title are the rolls of his lord's court, by which copyholds may be transferred from one to another as effectually, as freeholds may by deed. And he enjoys the method of passing his estate by the court-rolls, in lieu of the power which a freeholder has to alien his land by deed; for if a copyholder aliens by deed it is a forfeiture. 4 *Co.* 209. *Litt.* §. 74. *Alienare* (says my Lord Coke) *est alienum facere*, that is in legal understanding when the estate passes out of one into another, and that cannot be unless there appears some evidence of the right's being changed upon the rolls of the court. A copyhold is not devisable but by custom, for the statute of *Hen.* 8. of wills relates only to freeholds, and doth not extend to copyholds, so that a bare devise of a copyhold will not pass the estate, as it will of a freehold. *Cro. Car.* 44. And as a copyholder has not such power to devise as a freeholder has, so likewise he cannot exchange his estate by parol, as a freeholder could for lands in the same county at common law; but is obliged to surrender the same into the hands of his lord, to the use of him with whom he exchanges. So is 1 *Bulst.* 200. 1 *Inst.* 50. *a.*

The law will not supply a defect in a title against the heir at law, but will construe every thing in his favour; and therefore a surrender to the use of this will shall not be supplied, since that will be to the prejudice of the heir at law. *Salk.* 187.

2. The devise being void for want of a surrender, the lessor of the plaintiff has a good title as heir at law to the devisor. And if it be objected to him, that he is not heir on the part of the mother, I answer, that these lands are not descendible to the heir of the part of the mother, for though they came to *Jane Day* by her mother, yet the course of descent was altered by the surrender and devise made to her by the mother, under which the lands vested in her as a purchaser, and not as heir by descent. That a surrender will alter the course of descent is proved by this, that if there be two jointenants of copyhold lands, and one surrenders to the use of his will and dies; by this the jointure is severed, and the surrenderee is in from the surrender, by which the land is bound. *Co. Litt.* 59. *b.*

2 Cro. 100. Cro. Eliz. 717. And yet a bare devise would not take away the right of survivorship. So in the case at bar, the surrender and devise was a compleat conveyance to *Jane Day*; and though she died before admittance, yet her heir shall not be prejudiced. 1 Vent. 260. 3 Keb. 329. 4 Co. 22. b. Dy. 291. b. 2 Sid. 61, 37. (Contra Yelv. 144. Pop. 127. that the grantee of such a surrenderee shall not be admitted.)

The course of descent being therefore altered, and the devise to the defendant void, the heir at law of the part of the father has a good title, and therefore he prayed judgment for the plaintiff.

Darnall Serjeant contra. Agreed the devise would not pass the estate to the defendant without a surrender to the use of the will; but his possession would be a good title against the lessor of the plaintiff, who must recover upon his own strength. He can have no title as heir to *Jane Day*, because he is not heir of the part of the mother; for as he argued, *Jane Day* took the lands as heir by descent, and not as a purchaser under the devise. And that for these reasons:

1. Because her title by descent is more worthy than one by purchase; and where two rights meet, the elder or worthier is to be preferred. 2. Because the devise was void, being made to the heir, and therefore she shall be adjudged in by descent, which is most for her advantage. 1 Roll. Abr. 626. Salk. 241, 242. 3. Because admitting the devise was well made to the heir, yet in this case, it is not compleated by her admittance under it, as it ought to be; for before admittance she could be no purchaser, and then the lessor could not be heir to her as a purchaser, because his ancestor was never seised. 1 Roll. Abr. 627. pl. 9.

Jane therefore took by descent as heir of the part of the mother, and the lessor being only heir of the part of the father can have no title, since the lands remain descendible to the heir *ex parte materna*.

Chief Justice. The devise without a surrender will not pass the estate to the defendant, but his possession will be a good title against the lessor of the plaintiff, if *Jane Day* took as heir by descent; and that she was in as such is plain, because the surrender to her never took effect for want of her admittance, and so she had no good title as a purchaser, but her title by descent was compleat. She had her election of two rights, one vested immediately, and the other not before election, she died before election, and therefore that which vested must take effect: and then the course of descent

was not altered, and the heir of the part of the father can have no title. *Adjournatur.* And this term,

Devise of a copyhold to the heir is void, and he is in by descent.

Pratt Chief Justice delivered the resolution of the court. The case in short is this. It was the estate of *Hugh Hunt*, who married *Jane Triggs*, and by surrender and will devised it to *Jane* and her heirs. *Jane* surrendered it to the use of her will, and devised it to her daughter *Jane Day*, who before admittance devised it to the defendant, and died without any surrender or admittance.

As to the defendant there is no title in him for want of an admittance of *Jane Day*, and also for want of a surrender to the use of her will; and therefore the matter rests upon what title the lessor of the plaintiff can make, and if he makes none the defendant must have judgment.

And the title which the lessor makes is this: says he, I am the cousin and heir of *Jane Day*, *i. e.* I am the grandson and heir of *Thomas Triggs*, the elder brother of *John Triggs*, who was her father, and this being a void devise to the defendant, I am intitled to the estate as heir at law.

And it is true, and is so stated in the case, that the lessor is heir at law to *Jane Day*, that is on the part of the father; but the objection is, that these lands are descendible to the heir *ex parte materna*; and if they be, then the lessor has no title.

And in order to see what heir these lands are to go to, it is to be considered under what title *Jane Day* took the estate, whether she was in by purchase or by descent: if she was in by purchase, then the lessor must take them as heir to her: but if she took by descent, he has no title, because he cannot make himself of the blood of the first purchaser *Jane Triggs*, who was afterwards married to *Hunt*. *1 Inst. 12. b.* is express, that he must be of the blood of the first purchaser.

And we are all of opinion that *Jane Day* took by descent, and consequently the lands remain descendible to the heir *ex parte materna*.

Jane Day was heir at law to her mother, who surrendered the estate to the use of her will, and devised it to her daughter in fee; that is, she gave her such an estate as would have descended to her without the will.

Consider it first upon the surrender; that we all know was only an instrument by which the lord took nothing, and the estate notwithstanding remained in the surrenderor: this is plain from *Cre. Eliz.* 441. where the tenant made a second surrender, and it was adjudged for the second surrenderee, upon the bare surrender; therefore nothing passes, and the lands will descend notwithstanding.

The next thing to be considered is the will. *Quid operatur* by that, to prevent the course of descent. And we hold that to be of no force in this case. A devise to the heir is void, 1 *Roll. Abr.* 626. because he has a better and more worthy title by descent. This rule holds as well in the case of copyholds as freeholds. Indeed where the will devises the estate in a different manner from what it would have descended in, it will be good; this is so notorious, that instances will be needless.

If *Jane Day* was to claim by the will, that title was never compleat for want of an admittance. That plainly shews her election to be in of her more worthy title by descent. That was a compleat and a perfect title, but the other was not. And for this the case of *Abbot v. Burton* is strong in point, where a man seised in fee of lands which descended to him of the part of the mother, levies a fine to several uses, with a remainder to his own right heirs; and it was resolved, that this remainder was the ancient use, and the heir *ex parte materna* should have it. The case of a feoffment is certainly as strong as a surrender to the use of the will. Salk. 590.

The daughter therefore taking by descent, and the mother being the first purchaser; the lessor, if he claims any thing, must make himself heir to the mother, which he is not, and consequently the defendant must have judgment.

Hilary Term

8 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

} *Justices.*

Martin *vers.* Wyvill.

Q. Whether in B. R. the continuances may be entered *de die in diem*, or only from term to term?

IN *Trinity* term last the plaintiff delivered a declaration upon a stockjobbing contract, with an imparlance to *Michaelmas* term, and then upon a demurrer to the replication the book is made up, and after the first of *November* it was made a *concilium*, and the plaintiff had judgment *nisi* before the end of the term; and the day before the end of the term that rule is discharged, and an *ulterius concilium* to this term; at the first return of which the defendant comes in and pleads as *puis darrein continuance*, that the contract is not registered according to the act of Parliament: whereupon the plaintiff makes a special entry of the continuances from the first day of *Michaelmas* term to that day when it stood in the paper, and so on to the last day of last term, and then again to the first day of this term. And now *Wearg* moved to set aside the plea, because not pleaded after the last continuance, the time for registering expiring the first of *November*, after which there are two continuances upon the roll before the plea comes in, whereas all pleas *puis darrein* conti-

continuance should be pleaded before the next continuance after the fact happens; and as to the special entry here made, he said that indeed the common practice is only to enter continuances from term to term, because that being sufficient to prevent a discontinuance, the attornies for their own ease never enter any more; but yet in fact the party has a right to enter all the continuances, the proceedings here being *de die in diem*. Besides, the plea is false in fact, and that is another reason to set aside a dilatory; the words of the act are, "That such memorial shall be signed by the party," and it is upon that they ground themselves, for the contract is registered, and in this manner, "This contract was made for the benefit of me *William Martin*, and has not been compounded;" which being all the plaintiff's hand writing, that is a signing, though the name is not at the bottom. Like the case of a will, which the testator writes himself, and begins *I A. B. &c.* and does not subscribe it, yet that has been adjudged to be a signing. 3 *Lev.* 1.

A will written by the testator himself needs no signing.

As to the point of the continuances the court did not determine that matter: the C. J. and *Fortescue* J. inclined that as the fact would warrant it, every act of the court might be entered, and then the plea must be set aside, as not coming in time; but *Eyre* J. (*absente Powys* J.) thought this uncommon entry, which was to deprive the defendant of a benefit, which in the common course of practice he would be intitled to, ought not to be allowed; however they did not determine this point, being all of opinion, that for the second reason the plea should be set aside as false, saying it was constant experience at the assizes, to put the party to verify such a plea, before it is allowed, and if the party does not give some evidence of the truth of it, the Judge will reject it and go on with the cause. And at another day *Eyre* J. cited *Mo.* 871. that a plea *puis darrein continuance* could not be pleaded after a demurrer. The others gave no opinion as to this, but set it aside upon the point of its being false in fact, without meddling farther with the continuances.

Where a plea *puis darrein continuance* is put in, the court will immediately require some evidence of the truth of it. *Vide Hob.* 81. *contra.*

Colborne *vers.* Stockdale.

DEBT upon a bond conditioned for the payment of 1550 *l.* The replication will be ill, if it makes an immaterial part of the plea parcel of the issue. The defendant upon *oyer* pleads in bar, that part of the sum mentioned in the condition, *scilicet* 1500 *l.* was won by gaming, contrary to the statute, *per quod* the bond became void. The plaintiff replies, that the bond was given for a just debt, and traverses that the 1500 *l.* was won by gaming, *contra formam statuti modo et forma*, as the defendant has pleaded. The defendant demurs, and

Strange pro def. argued, that the replication was ill, because it makes the sum parcel of the issue, and obliges the defendant to prove, that the whole sum of 1500 *l.* was won by gaming; whereas the statute avoids the bond, if any part of the consideration became due on that account; and he urged the common case of a plea of payment *before* the day, where if issue is joined, and a verdict *pro quer'*, there shall be a repleader, because it leaves it open to a possibility, that there might be a payment *at* the day, and then the plaintiff could have no cause of action: so in this case the finding that the whole sum of 1500 *l.* was not won by gaming will not *toll* the presumption as to a less sum. Besides, the sum is put in only for form, and therefore within the reason of the case of *Stallard v. Tims*, the replication will be ill, for making it the substance of the issue.

Wearg contra insisted, that the replication following the words of the plea, would be well enough; and cited *Dy. 365. pl. 1.* for that purpose. *Sed per curiam*, There is no colour to maintain the replication: the material part of the plea is, that part of the money for which the bond was given was won by gaming, and the *scilicet*, *so much*, is only matter of form, of which no notice should be taken in the replication.

Wearg, then admitting the replication to be ill, so is their plea, and then the declaration must stand, and the plaintiff have judgment.

For this, my exceptions are, 1. That the words of the statute are not pursued: the statute says, the bond shall be void where it is given for money won by gaming, whereas the plea is, that the money for which the bond was given was won by gaming, and though in fact that may be the same, yet the very words of the statute should be pursued. *Sed per curiam*, It amounts to the same thing, and is good to a common intent.

2. The statute only avoids bonds given after the first of *May* 1711. and therefore the defendant should shew this to be so; and the time in the declaration (3d of *September* 1720.) will not be sufficient, because the bond may be given at a different time from what it bears date.

That which appears in the plaintiff's declaration need not be averred in the plea.

Strange. The time is not mentioned as the date of the bond, but that such a day the defendant *concessit se teneri*, which relates to the execution of it; and therefore it appearing upon the whole record to be since the statute, it is the same as if it had been in the words

words of the plea. *Et per curiam*, The answer is right, and there is nothing in that objection.

3. The main objection he insisted on was, that it is not shewn at what play or game the money was lost, and that ought to appear to the court, that they may judge, whether it was such gaming as is contrary to the statute: some people call stockjobbing gaming, and yet if it had appeared to the court, that there was no more in the case, they would not have determined it to be a gaming within this act of Parliament.

Where the defendant pleads that the bond was given for money won by gaming, he must shew what game they played at.

It may be said that concluding *contra formam statuti* is an averment that it was at such a game as is contrary to the statute, and then what game, is not material, but the case in *Dy. 363.* is a full answer to that, for *contra formam statuti* being only the inference of the party, must be supported by premisses, or it stands for nothing.

Strange contra. I shall endeavour to answer this by shewing,
1. That it is not necessary to mention the game, and 2. That if it be, the words of the plea are sufficient.

1. As to the first, there might be some colour for the objection, if the statute had only made it penal to play at some particular games, but here are added the general words, *other game or games*; so that it can answer no purpose whatsoever to particularize the game, because the bond may be void, and yet the money not be lost at any one of the games enumerated in the statute. The fact of gaming is all that need be alleged, the mode and manner of it is only matter of evidence, of which the jury are judges; and so it was said in the case of *Groenvelt v. Burwell*, *Trin. 12 W. 3. B. R.* where in trespass, the college of physicians justified under a conviction *pro mala praxi* in administering unwholesome pills and drugs, whereby a woman died; and it was held by the court, that if the matter of the conviction was traversable, even then the fact was sufficiently alleged, without setting out what the drugs were, because that was matter of evidence.

It is likewise considerable, whether obliging the defendant to mention the game, may not be a hardship; for though he may be able to prove in general, that he lost so much money at unlawful games, it may be impossible for him to distinguish how much was lost at hazard, and how much at picquet.

2. Admitting it necessary to be particular, the plea is sufficient; for if the statute avoids the bond where it is given for money lost at gaming, then the words of the plea, that the bond was given for money

money won by gaming contrary to the statute, are an averment that it was such gaming as is contrary to the statute. 1 Sid. 337. the plaintiff maintained his action on a promise made by the defendant *ut* administrator, and that was held an averment of his being so.

Besides, this general way of pleading, that the money was lost by gaming *contra formam statuti* is agreeable to the entries where offenses against acts of Parliament are alleged. *Co. Ent.* 46. a. *Rast. Maintenance.*

C. J. I think the game ought to be mentioned in the plea, for it is matter of law, and not barely evidence; and the saying in general that it was *contra formam statuti* will not be sufficient. *Et per Eyre J.* It is like the case of an usurious or simoniacal contract, where the agreement itself must be shewn; and so it is likewise upon the statute of *Edw.* 6. against the sale of offices, where the particulars of the contract must be expressed. *Et per Fortescue J.* In *Lutw.* 180. *Clift* 187. the game is mentioned. The plaintiff had judgment.

Cary *vers.* Jenkins.

Double plea. **I**N debt for rent *Strange* moved for leave to plead a tender and eviction, which was granted.

Dominus Rex *vers.* Filer.

Conviction
for keeping
(only) a
lurcher good.

CONviction on 5 *Ann.* c. 14. for keeping a lurcher to destroy game, not being qualified.

Mr. *Eyre* excepted, that it is not shewn he made use of the dog to destroy game; and it may be he only kept it for a gentleman who was qualified, it being common to put out dogs in that manner.

Sed per curiam, The statute 5 *Ann.* c. 14. is in the disjunctive *keep or use*, so that the bare keeping a lurcher is an offense, and so it was determined in the case of the *King* against *King*, *Pas.* 3 *Geo.* B. R. which was a conviction for keeping a gun, and it was not doubted by the court, whether the keeping was not enough to be shewn, but the only question they made was, whether a gun was such an engine as is within that statute: and in that case a difference was taken as to keeping a dog which could only be to destroy the game, and the keeping a gun, which a man might do for the defence of his house. The conviction was confirmed.

Dominus

Dominus Rex *vers.* Gibbs.

Indictment against the defendant for selling *diversas quantitates cervisiae lupulatae* (*Anglice* beer) *diversis fidel' subdit' Domini Regis* to the jury unknown, in unlawful measures; and on demurrer, Indictment for selling divers quantities of beer is too general.

Fazakerley excepted, that it is not said to whom the beer was sold; and *Sti.* 186. an indictment quashed for that exception, because the defendant, if he should be convicted, can never plead it in bar to a new indictment. *Sed per curiam*, It is well enough, the informer may not know the name of the person to whom it was sold; it is an offense, let it be sold to whom it would: indictment for the murder of a person unknown is good.

Second exception. That *diversas quantitates* is too general, and the court cannot form a judgment in what degree to punish him. *Cro. Car.* 380. 2 *Roll. Abr.* 80. *pl.* 14. 81. *pl.* 15, 16, 17. *Et per curiam*, For this fault the indictment must be quashed.

Adams *vers.* Verells.

ON a motion for common bail, it appeared to be a borrowing of stock, and a promise to transfer the same quantity at a future day. *Et per curiam*, There must be bail, for this is a lending, and therefore not within the act, which speaks only of contracts for the sale or purchase of stock. Borrowing of stock not within the suspending act.

Dominus Rex *vers.* Sparling.

Conviction for profane cursing and swearing sets forth, that one *William Collier* came before the justice, and gave information, that one *James Sparling* of the parish of *St. James Clerkenwell*, leather dresser, did within ten days last past profanely swear 54 oaths, and profanely curse 160 curses, *contra formam statuti*; and the witness being sworn did depose, the defendant swore 54 oaths and 160 curses, and the defendant being summoned and heard, the justice adjudged him to be guilty of the premisses, and to forfeit 21 l. 8 s. In a conviction for swearing and cursing, the oaths and curses must be set out. See 19 Geo. 2. c. 21.

Serjeant *Darnall* moved to quash the conviction, because the penalty is at the rate of 2 s. *per* oath, whereas the statute 6 & 7 *W. 3. c. 11.* lays the penalty at 1 s. only where the offender is a servant, Must shew the defendant not a servant if adjudge the penalty of 2 s.

servant, labourer, common soldier, or seaman, and therefore it should be shewn that the defendant is not such a person.

Baines contra. It appears by his addition that he is a leather-dresser. *Sed per curiam:* That is not enough, he may be so, and yet he may likewise be a soldier or seaman: in convictions for destroying the game, it must be shewn, that the defendant is not qualified, because otherwise the justices have no jurisdiction. So here to give the justice a power to adjudge the forfeiture at the rate of 2 s. it must appear, that the defendant is not such a person upon whom a less penalty is inflicted by the statute.

And the court held the conviction naught for another exception, that the oaths and curses were not set forth; for what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness: he may think false evidence is so: suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the court may judge whether they are seditious or blasphemous? the witness here takes upon himself to swear the law, and it is a matter of great dispute amongst the learned, what are oaths, and what curses: the case of *Colborne v. Stockdale* is fresh in every body's memory, where we held the particular game ought to be set out, because what is gaming is a matter of law. *Ante* 493. The conviction was quashed.

Lord Bernard *vers.* Saul.

On *non assumpsit* an usurious contract may be given in evidence.

ON a motion for leave to plead double, the court declared, that on *non assumpsit* the defendant might give in evidence an usurious contract, because that makes it a void promise; but in the case of a specialty, it must be pleaded. And on the trial the defendant was admitted to that evidence upon the general issue, and the plaintiff was nonsuit.

Dominus Rex *vers.* Bickerton.

If a libel be true it will be an inducement to B. R. to leave the same to a grand jury.

Mich. 9 Geo. Rex v. Bebar-

ON a motion for an information for a libel in advertising that one *Madox* an apothecary had personated Dr. *Crow* a physician, and wrote and took his fee (which the apothecary did not pretend to deny) the Chief Justice declared, that though truth be no justification for a libel, as it is for defamatory words, yet it will be sufficient cause to prevent the interposition of the court in this extraordinary case. *Rel,* an information for a libel upon the cornfactors at *Bear-key* denied for the same reason.

traordinary manner, and induce them to leave it to the ordinary course of justice before a grand jury. Whereupon the rule for an information was discharged.

Jewell *vers.* Hill.

IN the borough court after notice of trial the parties agreed to refer the cause, and during the reference the plaintiff, without new notice, went on to trial and had a verdict, which the judge afterwards set aside. And upon motion against him the court declared, that the judge of an inferior court might set aside such a verdict, upon the foot of irregularity. Judge of an inferior court may set aside a verdict for irregularity.

Dominus Rex *vers.* Reason and Tranter.

THE defendants being indicted by the grand jury that attends the court of B. R. for the murder of Mr. *Lutterell*, were brought up to the bar and arraigned, and pleaded Not guilty; and upon their request were remanded to *Newgate*, instead of being turned over to the marshal. Manlaughter, quid.

Upon the trial (which was at bar) we who were counsel for the King offered to give in evidence several declarations made by the deceased on his death-bed, whereby he charged the defendants with barbarously murdering him, and without much hesitation the court let us into that evidence. Whereupon we called a clergyman who attended him, and he swore that being desired by some friends of the defendants to press Mr. *Lutterell* to declare what provocation he had given the defendants to use him in that manner; he declared upon his salvation, that as he was a dying man he gave them no provocation, but they barbarously murdered him: that in the afternoon of the same day, two justices of the peace being present, and having given him his oath, he made another and more particular declaration to that purpose, which the witnesses at the desire of the justices took down in writing, but Mr. *Lutterell* not being able to write, it was not signed by him, and therefore we did not deliver it in. And the same witness proved, that upon his administering the sacrament to him he exhorted him in the most proper manner to deal ingenuously, and declare once more, whether there was no provocation given by him, and whether he would stand by the account he had before given; upon which the deceased answered, that as he hoped to be judged at the last day, it was every syllable true, and soon after expired.

When

When this gentleman had finished his evidence, the court called upon us to produce the paper that had been written from the mouth of the deceased, saying that was better evidence than the memory of the witness; whereupon we acquainted the court, that we had not the original, it being in the custody of one of the justices, whom going to *subpoena* we found he was in *Wales*; but the clergyman said he had a copy of it, which he took for his own satisfaction, before he delivered in the original to the coroner, and he offered to swear this to be a true copy.

Whereupon a debate arose, whether this copy was evidence or not: we who were for the King insisting, that the first paper being only the writing of the witness, not signed by the examinant, this which he now produced, was as much an original as that. But the court refused to let it be read, unless we could shew the original was lost, whereas it appeared we might have had it to produce, if we had sent after it in time.

It was then objected by the Chief Justice, that since the written evidence was not produced, the whole evidence of the deceased's declarations ought to be rejected, for the first, second and third being all to the same effect, are but one fact, of which the best evidence was not produced; and therefore he was of opinion, that we could not be let in to give any account of the first and third conference.

But the other judges were of opinion we might, saying they were three distinct facts, and there was no reason to exclude the evidence as to the first and third declaration, merely because we were disabled to give an account of the second.

Thereupon the witness was directed to repeat his evidence, laying the examination before the justices out of the case, which he did accordingly.

And upon the whole evidence the fact (upon which the question of law arose) was this:

The defendants were officers of the sheriff of *Middlesex*, and had a warrant to arrest Mr. *Lutterell* for 10*l.* they arrested him coming out of his lodgings, whereupon he desired them to go back with him to his lodgings, and he would pay the money. They complied with this, and *Reason* went up with him into the dining-room, having sent *Tranter* to the attorney's for a bill of the charges. Whilst *Reason* and the deceased continued together, some words passed

passed between them in relation to civility-money, which Mr. *Lutterell* refused to give, and thereupon went up another pair of stairs to order his lady to tell out the money, and then returned to *Reason* with two pistols in his breast, which upon the importunity of the maid he laid down upon the table, and retired to the fire which was at the other end of the room, declaring he did not design to hurt the defendants, but he would not be ill used.

By this time *Tranter* returned from the attorney's with the bill, and being let in by the boy went directly up stairs to his partner, being followed by the boy, who swore, that as he was upon the stairs (*Tranter* being that minute gone into the dining-room) he heard a blow given but could not tell by whom, and thereupon hastening into the room he found *Tranter* had run the deceased up against the closet door, and *Reason* with his sword stabbing him. Mr. *Lutterell* soon sunk down upon the ground, and begged for mercy; but *Reason* standing over him continued to stab him, till he had wounded him in nine places.

By this time the maid came in, and seeing her master in that posture, she and the boy run out for help, and immediately heard one of the pistols go off, and presently after the second, which a woman looking out at window on the other side the way proved to be fired by *Reason*; and several people upon the alarm of the maid coming into the room found Mr. *Lutterell* upon the ground where the maid left him, without any sword or pistol near him.

Upon the defendant's evidence it appeared, that Mr. *Lutterell* had a walking-cane in his hand, and that *Tranter* had a scratch in his forehead, which might be probably a blow with the cane, and the blow heard by the boy upon *Tranter*'s first going into the room. And one of the surgeons deposed, that the deceased had made such declarations to the clergyman, but this witness afterwards being alone with Mr. *Lutterell* pressed him very earnestly to discover the truth, upon which Mr. *Lutterell* did say, that he believed he might strike one of them with his cane, before they run him through.

Upon this the question arose; whether Mr. *Lutterell*'s striking one of the bailiff's first would reduce the subsequent killing to be manslaughter only?

For the King it was argued, that notwithstanding such stroke the defendants would be guilty of murder, that not being a sufficient provocation for giving the death's wound with the pistol: and for this *Holloway's case Cro. Car. 139.* and *Kelying 127.* were cited, where the woodward finding a boy in the park who came to steal wood, tied him

to a horse's tail in order to correct him, the horse run away and the boy was killed: and this was adjudged to be murder, because the tying him to the horse's tail, being an act of cruelty, for which no sufficient provocation had been given, he was answerable for all the consequences of it.

The defendants insisted, that the bringing down the pistols was a sufficient alarm to them to be upon their guard; and then when he struck one of them, it was reasonable for them to apprehend themselves to be in danger; and in such case a prudent man would not leave it any longer in the power of his adversary to do him any further mischief.

To this it was answered by the counsel for the King, that if Mr. *Lutterell* had continued to keep the pistols in his bosom, there might be some colour for an apprehension of danger; but the contrary appearing, viz. that he was at a distance from the pistols, with the defendants between him and them; they had no ground to fear any harm upon that account: and the death's wound was given after Mr. *Lutterell* was fallen down with the wounds he had received with the sword, and was intirely in the power of the defendants: so that what they did afterwards was murder in them, because it exceeded the bounds of self-preservation.

But the court in the direction of the jury did positively declare, that if they believed, Mr. *Lutterell* made the first assault upon the bailiffs, the killing with the pistol after he was down would be but manslaughter; and the jury upon that direction found them guilty of manslaughter only, though otherwise they were disposed to have hanged them for the barbarity of the fact.

The defendants prayed the benefit of the statute, and were burnt in the hand.

Between the Parishes of Cranly and St. Mary Guilford.

A lease at
will gains a
settlement.

UPON a special order of sessions it was stated, that a certificate-man agreed with the lessee of a mill, that he should occupy the mill, and pay 12 *l. per annum*; that there was no underlease or assignment, but in pursuance of that agreement the certificate-man occupied the mill two years, and paid the rent. The sessions adjudge it no settlement.

Et per curiam, The order must be quashed: for if this be not an absolute lease for a year (as *Eyre* Justice, said it was, the rent being reserved

reserved as the rent for a year) yet it is undoubtedly a lease at will, which is sufficient to gain a settlement.

Dominus Rex vers. England.

TWO orders of bastardy were returned, one made by two justices, and another original order made at sessions; and now both were quashed. The order of two justices, because the sex of the bastard, or the name of it, were not mentioned, only a certain bastard child born of the body of *A.* and the order of sessions, because there being an order of two justices before, the sessions had no jurisdiction but upon appeal.

Gilbert vers. Bath.

PER curiam, According to 1 Saund. 291. If the defendant in debt upon a bond would take advantage of another's being jointly bound, he must plead it in abatement, and cannot demur upon *oyer*: for if he does, the court will presume the other did not seal it.

There was a demurrer here, and the plaintiff had judgment.

Anonymous.

A Prisoner taken on an escape warrant moved to supersede it, on producing a day rule for that day. But the court refused a *superfedeas*, because it appeared he went out early in the morning, and did not sign the petition till he was taken up. Though Sir *Thomas Tipping's* case was urged, where he signed the petition in the morning, and went out before the court sat; and they held, that being intitled to a rule, that rule would protect him the whole day, and they could make no fraction of a day.

Gardener vers. Walker et ux'. In Canc.

AN executor brought his bill for the direction of the court touching the payment of a considerable legacy left by his testator to the defendant's wife, who was his daughter; and insisted to have the same put out for the benefit of the wife and her issue, and likewise for an injunction against the defendant's proceeding in the spiritual court in a suit there instituted for the legacy.

Chancery will order a legacy to a wife to be put out for her use where the bill is by the executor.

Ab. Ca. Eq.

On 64.

On the hearing the defendant insisted, that he having commenced his suit in a proper court, ought not to be enjoined; or if he ought, yet there could be no reason to direct the money to be put out as insisted on by the bill, it having been never done but in cases where the husband has brought the bill to compel the executor to pay the money; and no precedent was produced, where such directions had been given upon a bill brought by the trustee.

Et per Macclesfield Lord Chancellor, Then it is time to make one; can the difference, who is plaintiff in equity, alter the reason of the thing? If it should, it will but be for the husband, instead of coming here, to go into the spiritual court, (as to be sure he will) and so get the whole into his power. There must be the usual direction, that the money may be disposed of for the benefit of the wife.

Williams vers. Johnson.

At nisi prius in Middlesex coram King C. J. de C. B.

Wife witnesses
to prove
goods delivered
on husband's credit.

THE plaintiff brought his action against the daughter's husband for her wedding cloaths; and the defence was, that the goods were furnished on the credit of the father; and to prove this the mother who was present at the chusing the goods was called to charge her husband, and allowed.

Clark vers. Tyson.

At Guildhall coram Pratt C. J.

Tender of
stock, how to
be proved.

UPON an issue whether stock was tendered at the day, the plaintiff proved, that though the books were not open to make transfers in the common form, yet they were ready at the office, and upon leave from a director there might have been a transfer, it not being usual to deny it on such occasions; but the defendant not attending to accept the stock, the plaintiff contented himself with staying there all day, and did not actually get leave from a director to have the books opened if the defendant should come. And for this omission the Chief Justice ruled it not to be a sufficient tender, for there was a possibility that leave might not be given, and the plaintiff had not done every thing in his power: he ought to have prepared matters so, that if the defendant had appeared, there might have been a transfer immediately.

Mead

Mead vers. Hamond. Ibid.

THE plaintiff according to the common course of dealing delivered to the defendant's servant an ingot of gold to essay; and it not being returned, he brought trover against the master. And the Chief Justice directed the jury, that the delivery to the servant was sufficient to maintain the action against the master, on proving a subsequent demand and refusal; so the plaintiff had a verdict.

Trover lies against master for goods delivered to the apprentice.

Armory vers. Delamirie.

In Middlesex coram Pratt C. J.

THE plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

Finder of a jewel may maintain trover.

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Towers *vers.* Sir John Osborne.

At Guildhall coram Pratt C. J.

Executory
contracts for
goods, not
within the
statute of
frauds.

THE defendant bespoke a chariot, and when it was made refused to take it; and in an action for the value, it was objected, that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods. But the Chief Justice ruled this not to be a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by special agreement, and the seller is to deliver the goods immediately.

Dennison *vers.* Spurling.

In Middlesex coram Pratt C. J.

Wife of *pro-*
chein amy, a
witness.

IN an action by an infant, I called the wife of the *prochein amy*, and the Chief Justice allowed her to be a good witness. But the next day in *C. B.* between

Clutterbuck *and* Lord Huntingtower.

Guardian on
record, not.

I Called the defendant's guardian upon record, and Chief Justice *King* would not allow him. So note an authority on both sides of the question.

Hazard *vers.* Treadwell. *Ibid.*

Where the
master has
once paid for
goods deliver-
ed to the ser-
vant on trust,
the tradesman
may trust him
after.

THE defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before; sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods, but did not pay for them; and the Chief Justice ruled the sending him upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract.

Snow *vers.* Como. Ibid.

THERE was a demurrer to one count, and an issue on the other, and the *venire* was awarded, as well to try the issue as to assess contingent damages upon the demurrer. The plaintiff was nonsuit upon the issue, and the Chief Justice would not go on to assess the damages, saying he had no power so to do, the plaintiff being out of court.

Where the plaintiff is nonsuit on the issue, contingent damages on the demurrer shall not be assessed.

Brownson *vers.* Avery. Ibid.

A. Sells goods to *B.* and afterwards *C.* desires *D.* to pay *A.* and promises to repay him; *D.* pays *A.* and afterwards *B.* allows the money to *D.* on account; and in an action against *C.* I called *B.* to prove the account, (it amounting to payment). And it was objected, that the contract being originally only between *A.* and *B.* *B.* was still liable to *A.* and was therefore swearing to discharge himself; but the Chief Justice said he would allow him to be a witness to prove the payment as a servant to *C.*

Original debtor taken as a servant to prove the payment by another.

Shuttleworth *vers.* Bravo. Ibid.

BY the bankruptcy act it is provided, that if the bankrupt has within one year before lost 5 *l.* in one day at gaming, he shall not have his certificate, nor the usual allowance: and upon an issue out of Chancery to try the point of gaming, a creditor of the bankrupt was called, to prove the gaming: but the Chief Justice would not allow him to be a witness, because he would be intitled to a share out of the usual allowance to the bankrupt, which if he has not by having forfeited it on account of gaming, the dividend to the creditors will be the larger.

Creditor of bankrupt no witness to prove him a gamester.

Johnson *vers.* Wollyer.

At Guildhall coram Pratt C. J.

REPLEVIN in *London*, defendant appears upon an *elongata*, plaintiff declares for taking guns *in quodam loco vocat'* the *Minories* in *London*; defendant pleaded *non cepit modo et forma*. At the trial the plaintiff proved the taking at *Rotherhithe* in *Surrey*; upon which it was objected, that the plaintiff had not proved his issue,

Where in replevin the place is material.

issue, for the place is material, and therefore part of the issue under the *modo et forma*. The counsel for the plaintiff admitted, that it was traversable; but insisted that by not traversing it particularly, the place was admitted, and could not be insisted on upon *non cepit*. But the Chief Justice held, that where the plaintiff avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon the plaintiff was nonsuit.

Manwaring *vers.* Harrison. Ibid.

Within what time a goldsmith's note must be demanded.

UPON the 17th of September (being Saturday) about two a clock in the afternoon, *Harrison* gave to *Manwaring* in payment a note for 100*l.* by *Mitford* and *Mertins* goldsmiths, dated 5th of September, payable to *Harrison* or order. The same afternoon *Manwaring* pays away the note to *J. S. Mitford* and *Mertins* paid all Saturday and Monday, and on Tuesday morning as soon as the shop was opened, and before any money paid, *J. S.* came and demanded the money, but *Mitford* and *Mertins* stopt payment: *Manwaring* paid back the money to *J. S.* and demanded it again of *Harrison*; who refusing to pay it, an action was brought. And on *non assumpsit* the Chief Justice told the jury, that giving the note is not immediately payment, unless the receiver does something to make it so by neglecting to receive it in a reasonable time, by which he gives credit to the maker of the note. He left it to them whether there had been any neglect, and observed that the note was payable to *Harrison* who had kept it eleven days, and probably would not have demanded it sooner than *Manwaring* did, it appearing the goldsmiths were in full credit all the while. The jury desired they might find it specially, and leave it to the court whether there was a reasonable time; but the Chief Justice told them they were judges of that: whereupon they found *pro def.* and declared it as their opinion, that a person who did not demand a goldsmith's note in two days, took the credit on himself.

Philips *vers.* Biron et al'.

Paſ. 7 Geo. rot. 249.

TRESPASS and falſe imprisonment againſt two, who both plead jointly, that there was a judgment againſt the plaintiff at the ſuit of *Biron*, which was afterwards ſet aſide by the court, but that before it was ſet aſide a *capias ad ſatisfaciendum* was proſecuted by the then plaintiff, under which he and the other defendant, who was the officer, juſtify the imprisonment. And on demurrer *Wearg* objected, that though an erroneous judgment is a juſtification, yet an irregular one is not, for that is a matter in the privity of the plaintiff or his attorney. *Raym.* 73. The officer indeed, if he had juſtified ſeparately, might have made a better caſe than the plaintiff; but having joined with him he muſt take the ſame fate.

Where a judgment is vacated for irregularity, the plaintiff is not juſtified, as he is where it is reverſed for error.

2 Sid. 125.

Et per curiam, It is a reaſonable difference in the firſt point, and like the caſe of avoiding acts done by an adminiſtrator, where the adminiſtration is revoked, and not reverſed; in the caſe of error it is no fault of the party, but of the court, and therefore binds till reverſed. But as to the other point *Eyre J.* differed, for he thought the court might upon theſe pleadings ſeparate the officer, ſince it appears he is juſtified in what he has done.

Cæteri contra, That he had waived the benefit by joining with the other; and now the only queſtion before the court is, whether the whole plea taking it all together, be good or not. The treſpaſs is laid as joint, and the defendants juſtify it in the ſame manner; how then can the court ſever it and ſay that one is guilty and the other is not, when both put themſelves upon the ſame terms?

Adjournatur; and this term, it coming into the paper again, the court were of opinion, (*Eyre J. hæſitante*) that the officer had forfeited his defence, by joining in the ſame plea with the defendant, who was plaintiff in the firſt cauſe, and cited 1 *Saund.* 28. 2 *Cro.* 27. and gave judgment *pro quer.*

Where the officer joins in defence with one for whom the warrant is no juſtification, he forfeits the benefit of it.

Hammond *vers.* Stewart.

Attachment
granted a-
gainst a wit-
ness for not
attending on a
subpoena.

THE defendant summoned one *Turner* a witness to attend the trial of the cause, who on service of the *subpoena* said, he would not attend, but run the hazard of forfeiting the 100*l.* penalty; and on affidavit of this *Ketelbey* moved for an attachment, that they might not be put to bring their action upon the statute, saying they do it every day in Chancery, even for not attending a master upon his summons. And in the principal case the court made a rule to shew cause.

What notice
a witness
ought to have
of a trial to
which he is
subpoena'd.

And this term the rule for an attachment *nisi* against the witness was discharged, it appearing that the *subpoena* was not served till two in the afternoon in the city, to attend the sittings that day in *Middlesex*, which the court said was too short notice, and that witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be as little prejudice to themselves as possible.

Easter

Easter Term

8 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Glyn *vers.* Yates.

THE plaintiff recovered judgment against the defendant, and took out a *capias ad satisfaciendum*, and had a *non est inventus* returned and filed: then he took out *scire facias* against the bail, and before the return of the second *scire facias* the principal died, upon which the question arose, whether the bail should be relieved in this case, within the reason of that practice which indulges them to surrender the principal any time before the return of the second *scire facias*.

If the principal dies between the return of the *ca. fa.* and the second *sci. fa.* the bail are liable.

And after argument and search of precedents it was ruled, that the bail should not be relieved, they having taken the time after suing out the *capias ad satisfaciendum* at their own peril, and after that they could not discharge themselves but by an actual surrender.

Atkinson

Atkinson *vers.* Coatsworth.

*Indentura
facta inter
A. et B. im-
ports a sealing
by both.
3 Danv. Abr.
266.*

UPON error out of the county palatine of *Durham* in an action of covenant brought by the executor of the lessee against his assignee, wherein the breach was assigned in non-payment of rent to the original lessor; *Bootle* objected, that it did not appear, the first lessee ever sealed the lease; and if he did not, then there was no obligation upon him to pay the rent, and consequently no action could be maintained upon this covenant, which is only to pay the same rent to the first lessor, as was payable by the first lessee before the assignment. To which it was answered and resolved by the court, that the first deed being set out as *indentura facta inter* the lessor and lessee, by which the lessee *convenit et agreevit* to pay the rent, that was an implicit averment of a sealing by him within the reason of the case of *Taylor v. Dobbins*, Mich. 7 Geo. where *fecit notam suam* was held to import a signing. *L. Raymond* 1377.

2. That if this was not so, yet the defendant by covenanting to pay the rent reserved by the first indenture, was estopped to say there was no such deed as could raise the rent. And therefore the judgment given below for the plaintiff was affirmed.

Dominus Rex *vers.* Inhabitantes de Rufford.

*Mandamus to
appoint over-
seers in an ex-
traparochial
place.*

MANDAMUS directed to the justices of the peace of the county of *Nottingham*, reciting, that within the *ville* of *Rufford* there are divers substantial freeholders able to contribute to the maintenance of the poor, and that there are no churchwardens or overseers to make a rate, and that there are poor unprovided for, *ideo* it commands them to appoint overseers.

They return, that the *ville* of *Rufford* is part of no parish, but time out of mind has been extraparochial without church, chapel, or parochial rights, and that there never have been any overseers of the poor, *et ea de causa* they cannot appoint.

And there having been only an *obiter* opinion of the court in the case of *Dolting v. Brewcomblodge*, Hil. 11 Ann. B. R. that overseers of the poor might be appointed in an extraparochial place; the court directed an argument, that the point might be solemnly determined.

And

And after argument and consideration of all the statutes relating to the poor, the court were of opinion, that the powers given by the 43 *Eliz.* to be executed in parishes, were by the 13 & 14 *Car. 2. c. 12.* extended to all townships and villages, whether parochial or extraparochial, and consequently overseers might be appointed in this case, for which purpose a peremptory *mandamus* was awarded.

Mayo vers. Archer.

IN trover for goods, on Not guilty pleaded a trial was had at *Nisi prius* in London, where the jury found this special verdict: *Qu. Whether a farmer who buys and sells potatoes can be a bankrupt.*

That one *Richard Baxter* for divers years before any commission of bankruptcy taken out against him occupied a farm of 300 *l. per annum*, and during such occupation annually planted divers acres of the farm with potatoes, which he sold for gain: that he likewise bought of other persons several great quantities of potatoes, with intention to sell them for gain, which he publickly did in several markets, and that he hired warehouses to put them in, till he could conveniently sell them. That if this makes him a trader, he committed an act of bankruptcy within the intention of the statutes, and a commission issued, and the plaintiff was made assignee. That after the act of bankruptcy, and before any commission issued, the defendant recovered judgment against the said *Baxter* for 600 *l.* debt besides costs of suit, and took out a *fieri facias*, by virtue whereof the sheriff seized the goods mentioned in the declaration, which they find were before the bankruptcy the goods of *Baxter*. And whether *Baxter* was a trader or not within the intention of the several statutes against bankrupts, is the doubt of the jury, whereon they pray the advice of the court: *et si pro quer'*, they assess damages, and if not a trader, they find *pro defendente*.

Chefeyre Serjeant *pro quer.* The 13 *Eliz. c. 7.* (which the subsequent statute *Fac. 1.* appoints to be largely expounded) describes a bankrupt to be one buying and selling for gain. I admit a farmer or an inn-holder are not within the statutes, and were construed to be exempt before 5 *Annae* had made them so. *Cro. Car. 549.*

His being a farmer will not screen him, if he deals as a trader likewise, and therefore I should think some farmers might be made bankrupts under the notion of cheesemongers. I remember a motion to supersede a commission, where it was held that a gentleman of the

bar who had a colliery, and dealt in coals at *Durham*, was such a trader as might be a bankrupt. He need not get his whole living by buying and selling, for the word is *seeking* not *getting*, and therefore if he seeks his living this way, his seeking it another way will not alter the case. A dealing of this sort gains him that credit, which traders give one another, and that is the best rule to go by. 1 *Vent.* 166, 266, 29. 1 *Sid.* 411. 1 *Lev.* 17.

Artificers differ from those that buy and sell, and yet they may be bankrupts. Such are shoemakers, and many others.

There can be no doubt but such a dealing as this would have made him a trader, if the farming had not been found; now if that be taken to have altered the case, every man may take a farm, in order to avoid the statutes.

Brantbwayte Serjeant *contra*. He might buy these potatoes in the ground, as many gentlemen do a crop of turnips, of which they sell the overplus, and yet were never reckoned to be traders. The case in 1 *Roll.* 520. says, that the buying and selling in order to promote a business which does not make a trader, will not cause a man to be a bankrupt. 2 *Jones* 156.

Chief Justice. I think the question will turn on the manner of finding, for there can be no doubt but on one hand a farmer cannot be a bankrupt, and on the other, that a dealer in potatoes may, if such a dealing be found as will shew it to be the man's trade: it is indeed said only, that he bought divers great quantities, which in an indictment would be ill; but I am inclined to think it will be well enough here, where it is only necessary to shew that he sought his living in that manner. I should think, if a *Herefordshire* man bought apples to mix with his own, and then sold the cyder, he would be a trader. As far as circumstances can conclude, it appears this man was a trader, for he bought the goods, and kept markets and warehouses. *Powys* Justice *accord*. If a farmer should deal in wool or hops, he will be a trader, and so will an inn-keeper who sells corn in quantities, which are not consumed in his house.

Eyre Justice. The verdict must set out the quantities, that we may judge what share of his living was sought thus.

Fortescue Justice said the quantity must be mentioned, That it might appear whether this or farming was his chief business.

Adjournatur. And afterwards the plaintiff moved, on an affidavit that the quantities were proved at the trial, that a *venire facias*

de novo might be awarded. *Sed per curiam*: Let the special verdict be amended in that respect: and so it was, and stood over upon an *ulterius*. And Mich. 9 Geo. without much argument judgment was given for the plaintiff.

Land vers. Harris.

THE defendant gave bond to pay a sum of money by instalments at 5 *l. per annum*, and having failed at one of the days, the plaintiff brought his action for the penalty. And now *Wearg* moved upon the act for amendment of the law, that upon paying the 5 *l.* and costs, proceedings might be stayed. *Sed per curiam*: We cannot do it, for it never was the intent of the obligee that he would be put to so many several actions as one a-year.

The act for amendment of the law relieves only on payment of the whole principal.

Windham vers. Wither.

Idem vers. Trull.

THE plaintiff brought two actions upon a promissory note, one against the drawer, and another against the indorser, and recovered in both. And now *Wearg* moved, that they having tendered the principal in one, and the costs in both, no execution might be taken out; which the court ordered accordingly, and said they would have laid the plaintiff by the heels, if he had taken out execution upon both.

Practice

Hall vers. Stone.

UPON executing the inquiry, the plaintiff was surprized with a defence, and not prepared to prove his whole demand; and the court set it aside on payment of costs, the damages being too small.

Writ of inquiry set aside where damages too small by neglect of plaintiff.

Lawrence vers. Jacob.

IN an action by the second indorsee of a bill of exchange against the first indorser, it was held sufficient to say the drawer had not paid it, without shewing a demand.

In action against indorser, need not shew demand on drawer.

Jordan *vers.* Harper.

In ejectment
the plaintiff
has his elec-
tion to pay
costs to which
defendant he
pleases.

SIR *Sebastian Smith* brought an ejectment against several persons who lived in cottages upon the waste as *paupers*, to try whether the cottages belonged to him as lord of the manor. The parish made defence, and the plaintiff was nonsuit, and paid the costs to one of the defendants who was in his interest; and upon motion the court said, they could not relieve the parish or the other defendants.

Connor *vers.* Martin. In C. B.

Feme covert
cannot indorse
a bill of ex-
change.

THE plaintiff declared upon a promissory note made to a *feme covert*, and indorsed by her to him, and on argument judgment was given for the defendant, the right being in point of law vested in the husband, and the wife having no power to dispose of it.

Dominus Rex *vers.* Archiep' Armagh.

What acts of
Parliament
bind the
crown, tho'
not named.

ERROR of a judgment in *B. R. in Hibernia* in a *quare impedit* brought by the crown for the presentation to the church of *Louth*, being an advowson in gross. The attorney general counts that King *Charles* the Second was seised of this advowson in right of his crown, and presented one *John Hudson*, and so alleges several presentations by the crown, and brings down the title to his present Majesty, and shews a vacancy by the death of *Thomas Cox*, unde it belongs to the King to present; but the bishop and *Peter Jackson* *eum injuste impediunt*.

The bishop pleads, that long before 10 *Car. 1.* and ever since, there were within the parish of *Louth* both a rectory and vicarage endowed, and that King *William* and Queen *Mary* being seised of the advowson of the rectory presented the said *Thomas Cox*, who was admitted, instituted and inducted; and *Narcissus* archbishop of *Armagh*, being seised of the advowson of the vicarage, in the year 1712 presented the said *Peter Jackson*; and *Cox* died and *Jackson* survived, and before any presentation by the crown, the archbishop, by virtue of an act of Parliament 10 *Car. 1.* by writing under his archiepiscopal seal, united and consolidated the rectory and vicarage, *prout ei bene licuit*: and so concludes that he claims nothing but as ordinary, with the proper averments to bring the rectory and vicarage within the description of the act of Parliament.

The incumbent pleads the consolidation in the same manner, and the attorney general demurs to both pleas, and judgment is given below for the King, and on error in this court the general errors are assigned.

Fazakerley pro queren. in errore. The only question below, and which I shall speak to is, whether the crown shall be bound by this act of Parliament though not specially named: and to prove that the King is bound, I need only instance in some of the exceptions out of the general rule laid down in the books, and shew that this case falls within them. Acts for the advancement of religion, learning, providing for the poor, are mentioned as cases where the crown is bound. 11 Co. 70, 72, 73. 2 Inst. 359, 681. Plow. 248. 5 Co. 14. 1 Roll. Rep. 151.

This provision is for the advancement of learning, by making it worth the acceptance of a man able to instruct the people: it encourages learning, when ministers have a prospect of being rewarded for their pains; and the poor will be the better for it, because the parson will be more able to relieve them.

Reeve contra. At the time of the union there was a right in the crown to present on the vacancy, and the intention of the statute was, that the union should be made when both the rectory and vicarage were full, that so both patrons might have an equal chance; for after the clause which enables the archbishop to consolidate, the act provides, that during the lives of the two incumbents they shall enjoy the rectory and vicarage distinctly, and upon the death of either, then the two rights shall survive to the other, and the patron of him that died first shall have the first presentation: no direction is given for settling the right, where the union is made during the vacancy of one; which shews that the intention of the Parliament was, to have the union made when both the incumbents were living: but now by this contrivance the archbishop is sure in all events of having the first presentation to the united benefices.

C. J. At common law two churches could not be united without consent of both the patrons, but now this act of Parliament giving the archbishop a right to controul the title of the patrons, we must construe it strictly, that so the act may do as little wrong as possible: and therefore if upon considering every part of the act it appears to be the intention of the Parliament that the union should be made when both the rectory and vicarage were full; as this construction works the least injustice, we shall certainly follow it if possible.

The clause runs thus: " And whereas in divers places of this
 " kingdom of *Ireland* there are within one parish both a parson
 " and vicar endowed, and in some parishes more: be it enacted,
 " that in every such case it shall and may be lawful to and for the
 " bishop of that diocese and metropolitan of that province within
 " which the said parishes are situate, by their writing under their
 " archiepiscopal and episcopal seals, at any time or times hereafter,
 " to unite and consolidate all and every the said parsonages and
 " vicarages so being within one parish, into one intire parsonage or
 " rectory or benefice, *yet nevertheless so*, that if such parsonages
 " and vicarages, or any of them, be at that time full of incumbents,
 " that every of the said incumbents may hold and retain to their
 " own use his and their respective parsonages and vicarages, and all
 " the profits thereof, for so long time as they shall live, and con-
 " tinue lawful incumbents thereof; *and if one* or more of such in-
 " cumbents do die, or otherwise cease, resign, be deposed, or de-
 " prived, that then the said parsonage, vicarage or benefice, so or
 " by any other means growing void, shall survive, remain, and
 " accrue, to the survivors of the said incumbents; and after such
 " survivors accruing or coming into one hand, shall thenceforth for
 " ever be and continue one whole and intire rectory and parsonage
 " or benefice, according to the union and consolidation aforesaid to
 " such surviving parson and his successors for ever." And then it
 goes on to direct the method of presentation; and as to this case the
 direction is, that after the death of the survivor the patron of him
 that died first shall present, and then to take it by turns.

Now taking all this together I think the only view of the Parlia-
 ment was, to have the union made when both churches were full,
 and therefore they provide, that though the union be made when
 both are full, yet it shall not take effect till the death of one of the
 incumbents. As to that which was the main point below, I think
 they were mistaken, for I take it the King will be bound in this
 case; but we will consider of it.

Powys J. It is far from being clear to me, that the King shall
 not be bound by this act of Parliament. As to the construction of
 it, I think the only reasonable one is, that the union should be
 made in the life of both incumbents.

Eyre J. I think this statute will extend to the crown, because it
 does not deprive the crown of any prior right, but only new models
 it, and therefore differs from *Dr. Birch's* case, where the ancient
 prerogative of the crown was to be destroyed. As to the construc-
 tion of this statute, I am of opinion, that the archbishop may unite
 during

during the vacancy, for the power is given him to do it *at any time or times*, and then when the subsequent clause provides only for some particular cases, I can only take it to be a direction as to those particular cases, and not intended to abridge or controul the former power; and as to all other cases not expressly provided for, they must receive such a determination as is agreeable to law: this is what sticks with me, and is the only difficulty in the case, whether the latter part of the clause be a restraint of the general power, which it must be admitted would (if it stood singly upon that) include the case now before us.

Fortescue J. I make no doubt but the crown is bound by this statute; but then as it works a wrong to the crown, whichever way we take it, I think we are to afford it no latitude in construction. The case at bar I take to be neither within the words nor meaning of the statute, *yet nevertheless so that, &c.* is a part of the same clause, and in my apprehension is the same as if the statute had run, *yet in these cases only, &c.* for as they are introductive of a new law, they infer a negative; and therefore if this case does not fall within the subsequent provisions, it is not a case within the act of Parliament. Can any man think the Parliament would do so absurd a thing, as to give an alternative, and not say who shall present first? And yet that will be the case of all consolidations, that do not fall within the direction of the subsequent words: but then it is said this case must be left to the decision of the law; for my part I know of no law that will determine who shall present first; so that by this method of consolidating during the vacancy, the archbishop is to unite the King's rectory to his vicarage, and so to get the first turn; whereas take it the other way there will be no difficulty; it is expressly determined who shall present first, and the act does as little wrong as possible, by giving an equal chance to both: for these reasons I think the court below have done right in giving judgment for the King.

Adjournatur; and this term it was argued by Serjeant *Reynolds pro queren. in errore*. It being given up at the bar, that the crown was bound by the statute, he proceeded to maintain the consolidation, though made during a vacancy of the rectory. At common law all unions were derived from the authority of the ordinary with the licence of the crown and the consent of the patrons. 2 *Corp. jur. civ.* 256. *Cro. El.* 500. 2 *Roll. Abr.* 778. And *Dy.* 259. says, the proper time for an union was in a vacancy. If the statute has not adjusted the manner of presenting in this particular case, it must be done according to the rules of the common law.

Wearg

Wearg contra. The common law has laid down no rules; for as these things were done by consent, the parties settled that matter amongst themselves. This act according to *Hatton of statutes*, must be construed to work as little wrong as possible; the law regards our advowson as a thing of value, it is what we have a property in, there is a recovery in value for it, and it may be sold. The 31 *H. 8.* had no saving of the rights of strangers; and yet *Jones Sir William 71.* it was held to be implied in order to prevent a wrong.

It may be a question whether by this union the patron of the vacant rectory has not intirely lost this right, it being difficult to determine how the ancient right can subsist in the new created church, since he can never say that church has been full of *his* incumbent, as the archbishop may.

C. J. Though the words of the act are general enough to take in this particular case; yet if it appears not to be within the intent and reason of the statute, we must construe it to be excluded. The plain intent was, that the union should be upon the most equal terms, and the least prejudicial to either party in favour of the other. At the time of the union the crown had a right to present, and this is to be taken away without any equivalent, by a construction that is to let in *iniquum*, and by a contrivance that ought not to be favoured. Besides the apparent injury of depriving the crown of the present turn; it is considerable, that the act not having settled the terms of presenting for the future, but only where both are full at the time of the union, it must necessarily create great difficulties in adjusting the right upon an union made whilst one church is vacant. I think this is a case that deserves no farther consideration, and the judgment must be affirmed. To which *Powys J.* agreed. *Et per Eyre J.* It is plain the prerogative right is invaded by the archbishop, who makes himself judge in his own case. *Fortescue J. accord.* And the judgment was affirmed,

Curwen *vers.* Fletcher.

Matters of record pleaded by way of dilatory if of another court must be *sub pede sigilli.*

DEBT upon a bond: the defendant pleads in abatement, that the oaths were tendered to the plaintiff by virtue of the statute 1 *Geo.* as a suspected person, and upon his refusal to take them the same was certified to the quarter-sessions and there recorded, *prout, &c.* and afterwards the same was certified into *B. R.* by the clerk of the peace, as the statute directs, whereby the plaintiff be-
came

came a papist recusant convict; *unde* the defendant prays *quod loquela remaneat sine die, &c.* And the plaintiff demurs.

Wearg pro quer. This being a dilatory, the record of sessions ought to have been pleaded *sub pede sigilli.* 1 *Inst.* 128. *b.* *Lutw.* 17, 1100. 3 *Lev.* 334. *Mich.* 5 *Geo.* in *C. B.* *Cotesworth* and *More*, this exception was taken and allowed; for if *nul tiel record* were replied, there must be no day given. *Bro. Record* 36. And though the clerk of the peace has certified it hither, yet that is not conclusive, but traversable. 41 *E.* 3. 26. *Bro. Traverse of Office* 2. For he does not do it as a Judge, but as a ministerial officer.

2. The statute 1 *Geo.* which creates this disability, has a proviso to exempt persons who before such tender have taken the oaths, and therefore it ought to have been averred that he had not taken them. On the statute 5 *Eliz. c.* 4. it was always usual to aver, the party did not exercise the trade at the time of making the statute. 1 *Ven.* 148. 1 *Sid.* 303. Now indeed that is discontinued, by reason of a moral impossibility, of which there is none in our case. It will be said, that this coming in by way of proviso, ought to be shewn on the other side; but that rule does not hold place, where the matter is the very *git* of the whole. 1 *Leon.* 18.

3. There is another proviso, to restore the party on conformity; so that the disability being only temporary, the defendant ought not to pray that the *loquela* may be put without day. 1 *Inst.* 128. *b.* 5 *Co.* *Trollop's* case. *Lutw.* 17, 18. And it has been held, that an ill prayer of judgment vitiates the whole plea. 5 *Mod.* 145. *Salk.* 297.

Bootle contra. The record of sessions alone does not create the disability, but only that of this court, which is the sum of all: and records of the same court need not be pleaded *sub pede sigilli.* *Lutw.* 40. 2. This coming in by proviso ought to be shewn by them in their discharge. 1 *Ven.* 134. 1 *Lev.* 26. 3. The *&c.* at the end implies every thing proper to make it a right prayer of judgment. At least this should have been shewn for cause of demurrer. 3 *Lev.* 66. *Lev. Ent.* 11. *Thomf.* 191. *Brownl. Red.* 461, 466. 2 *Mod. Ent.* 6. 1 *Inst.* 362. *Litt.* § 691. 2 *Lev.* 19. 34 *H.* 6. 1, 2, 24.

Wearg. It still continues a record of sessions, and the clerk of the peace only transmits an account, that there is such a record.

Et per curiam, The disability being only temporary, this plea is in the nature of a dilatory, and therefore should be pleaded *sub pede sigilli*. And it is considerable, whether this certificate be any record of this court. This does not seem to be within the general rule of proviso's, because the enforcing people to take the oaths being the aim and design of the statute, it is much stronger than the common case of a proviso.

Where matter
of record must
be pleaded
sub pede sigilli.

Adjournatur; and this term it was argued by *Fazakerley pro querente*, This plea of a disability cannot be pleaded after a general imparlance. 1 *Mod.* 14. *Yel.* 112. 1 *Ven.* 76, 135. Neither can privilege. 3 *Lev.* 343. *Trin.* 9 *Ann.* in *C. B. Kelsey v. Sedgewicke*. Nor to the jurisdiction. 1 *Lev.* 89. 1 *Inst.* 128.

2. It should be with a *profert in curia sub pede sigilli*, whereas it is only with a *prout patet per recordum remanens* in this court. *Bro. Record* 36. *Co. Lit.* 128. *Lutw.* 17, 18. 3 *Lev.* 334. *Lutw.* 1100. *Lit.* § 201. *Mich.* 5 *Geo.* in *C. B. Moor v. Coatsworth*, this exception was taken and allowed on demurrer. The matter of the conviction is traversable, and should therefore be alleged, otherwise you give the clerk of the peace a very great power to bind persons by his certificate. 1 *Leon.* 205. *Mo.* 541. *pl.* 714.

He mentioned the two other exceptions, for want of a *quousq.* and that of the proviso, and cited the same cases.

Reeve contra. The rule laid down as to imparlances is generally right, but the reason of it does not extend to this case; for where you are to give the plaintiff a better writ, you must do it in the first instance, that he may receive as little delay as possible; but here we say the plaintiff is intitled to no writ at all.

2. The conviction is a record of this court, and so need not be pleaded *sub pede sigilli*; and this differs from the case of an outlawry, where the record is that which creates the disability, whereas here the record is only the evidence of it. It is a matter of fact, whether he neglected to take the oaths, and as such it might have been traversed; and it is like the plea of *auter action pendent* in another court, which is never pleaded *sub pede sigilli*, because it involves a matter of fact, whether both are for the same cause of action.

3. It will be very well without a *quousque*, and there are many precedents so in the case of an excommunication pleaded. 1 *Inst.*

127, 128. *Raft.* 320, 333, 334. *Lev. Ent.* 11. *Tbo.* 191. It would be well enough, if it was only *petit judicium*, because the court will give the proper one. 2 *Lev.* 19. 1 *Lev.* 222. *Hil.* 2 *Ann.* B. R. *Wilson v. Crofs*, *Error e C. B.* in replevin, the defendant pleaded *prisel en auter lieu*, to which there was a demurrer concluding in bar; and the court rejected all that came under the *petit judicium*, saying, as that was sufficient, the other should not vitiate it.

He said the proviso extended only to such as were to take the oaths upon account of qualifications, but upon looking into the act of Parliament, it appears to be general.

Curia advisare vult. And *Trin.* 11 *Geo.* *respondes ouster agard*, without further argument or debate, they saying it could never be supported after an imparlance.

Trinity

Trinity Term

8 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Dominus Rex *vers.* Inhabitantes Sancti Petri in Civit'
Oxon'.

If the master carries his servant on a visit and stays forty days, the servant gains a settlement.

MARY Norris having intruded herself into the parish of *St. Peter*, was by an order of two justices removed to *Fawley-Court*, as the place of her last legal settlement. Upon appeal to the sessions they state the fact specially, that she was hired for a year into *Christ-Church* College in *Oxon*, being an extraparochial place, where she served part of the time; that during the year her mistress went upon a visit to *Fawley-Court*, where she staid three months, and took her servant with her, and afterwards they returned to *Christ-Church*: and upon the whole, the sessions discharged the order for sending her to *Fawley-Court*.

And now upon debate it was adjudged a settlement in *Fawley-Court*, and consequently the last order was quashed, and the order of two justices set up again.

It

It was not disputed, since the case of *Rufford*, but that the hiring into an extraparochial place would give a settlement. The only doubt was, whether the settlement gained at *Christ-Church* was not superseded by a subsequent settlement at *Fawley-Court*; and they were all of opinion, it was. As to the case of a master who goes upon a visit, they strongly inclined it would be no settlement; because it must have that consequence, that he may be sent away. But as to the case of the servant, they all held it a settlement; for he comes there in the capacity of a servant, and is taken to be hired into any parish where he serves forty days; and it is not material to him, whether the master goes there under the capacity of gaining a settlement or not; like the case of a school-boy, he gains no settlement, but the servant that waits upon him will. And the court said, they could not take the return to *Christ-Church* to have given her a new settlement there, it not being stated to have had a continuance of forty days.

Dominus Rex vers. Inhabitantes de Lambeth.

THE parson lets his tithes to farm; and the farmer agrees with the tenant of the land, that in consideration of his paying so much, he shall retain the tithe, and gather in the whole crop without dividing: and which of the two is chargeable to the poor's rate as occupier of the tithes was the question. And the sessions discharge the lessee of the parson, and tax the tenant of the land. *Et per cur'*: The order must be quashed. The farmer of the tithes is *prima facie* liable to the poor's rate, and therefore unless he can throw that charge over upon another, the tax must be made upon him. The tenant of the land in this case can never be said to be the occupier of the tithes; for he is either a person who buys the tithes, or else he is to be taken as only excused from paying any; and no body can say but that though the parson thinks fit to excuse a parishioner, he will still remain in point of law the occupier of the tithes. This agreement being only by *parol*, cannot enure as an under-lease of a thing that lies only in grant. Suppose it was the case of underwoods, which are sold standing, and the vendee grubbs them up; can it be imagined, that makes him the occupier; or suppose the tenant sells the whole crop standing, will that make him less the occupier of the land? If it should, it would be impossible for the officers of the parish to know whom to charge. We must take this tenant of the land to be like any other buyer of the tithes, since he has no more title to them than any stranger whatsoever; and when the parson or his farmer receives a sum of money in lieu of tithe, that is in law a receipt of the tithe; with

Where the parson agrees that the tenant shall retain the tithes, yet the tax for them must be upon the parson.

this only difference, that it is not tithe in kind. In the case of a composition (as this is) or a *modus*, it was never thought but that the parson was chargeable as occupier of the tithe: therefore there being no colour to charge the tenant of the land, the order of sessions must be quashed.

Between the Parishes of Eastland and Westhorsley.

Turning the
servant out
of doors be-
fore the end
of the year
doth not pre-
vent the set-
tlement.

THE fact was stated specially on an order of sessions, that a servant was hired for a year, and the day before the year expired the master told him, that to prevent his gaining a settlement in that parish, he should go away immediately, which the servant refused to do, insisting to serve out the year, whereupon the master turned him out of doors. And the court held this to be such a fraud in the master, as should not prevent the settlement of the servant.

Robinson *vers.* Davis.

Practice.

UPON affidavit that the original award was lost by coming up in the *Bristol* mail, which was robbed; *Hussey* moved upon a copy of it, and had a rule for an attachment *nisi*.

Fisher *vers.* Emerton.

Practice.

THE plaintiff got judgment on the *scire facias* against bail, pending error by the principal, and took them in execution; and now they moved to be discharged. *Sed per curiam*: Though you might have applied, and had the proceedings stayed; yet we will not set them aside. If an action of debt had been brought upon the judgment, we should have granted an imparlance, if it had been asked; but we never set aside the judgment, when it is once signed; because we take it, you by your not applying in time have submitted to meet the plaintiff. *Fieri non debet, factum valet*.

Noke *vers.* Caldecot.

Warrant of
attorney of
any term *pen-
dente lite* is
sufficient.

UPON error *e C. B.* the court held, that if there be a warrant of attorney of any term *pendente lite*, it is enough to warrant the proceedings, and there is no necessity it should be of the term in the *Placita*.

Colebrooke vers. Diggs.

THE plaintiff obtained judgment in *B. R.* of which error was brought in the Exchequer-Chamber, and bail put in: after affirmance there, error was brought returnable in Parliament; and upon consideration the court held that there must be fresh bail.

There must be new bail on a second writ of error.

Fry vers. Carey.

AN action was brought in the sheriff of London's court against two partners, one brings a *habeas corpus* and puts in bail for himself only. And *Strange* moved for a *procedendo*, which was granted; for otherwise the plaintiff will be disabled to go on in either court.

Procedendo.

Dominus Rex vers. Green.

MOVED to exhibit articles of the peace on behalf of *Elizabeth Collet* a Quaker, but she refusing to swear, the court could do nothing.

Quaker cannot exhibit articles of the peace without oath.

Between the Parishes of *Hobey and Kingsbury.*

TWO justices adjudging the settlement of the husband to be at *Kingsbury*, and that he is likely to become chargeable to *Hobey*, send him, his wife, and son of one year old, to *Kingsbury*: and whether this was good as to the wife and child was the question; and held well enough, and the order confirmed.

Adjudication of husband's settlement sufficient to send the wife with him.

Anonymous.

In Middlesex coram Pratt, Chief Justice.

THE Chief Justice allowed the wife's declaration, that she agreed to pay 4 s. per week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women.

Declaration of wife, where evidence against her husband.

Michaelmas

Michaelmas Term

9 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Inter paroch' Sancti Petri in Civit' Oxon' and Chipping
Wicomb in Com' Bucks.

Hired servant
is settled
where service
is.

UPON a special order of sessions it appeared, that the master of the *Oxon* stage coaches hired a servant for a year, to stay in an inn in *Wicomb* where the coach baited, and to take care of the horses: he lived there for the whole year, but in as much as the master lived all the while in *Oxford*, the sessions adjudge the settlement of the servant to be with him. *Et per curiam*: The order must be quashed, for the settlement is gained by the service, which was in *Wicomb*; and it would be hard to make it a settlement in *Oxon*, when the officers there had no power to remove him: the officers of *Wicomb* might have removed him, if they had pleased; they did not do it, and therefore they must provide for him.

Between the Parishes of St. John's in the Town, and
Amwell in the county, of Hertford.

BY the statute 9 & 10 W. 3. c. 11. it is provided, that no certificate-man shall gain a settlement in the parish to which he comes with such certificate, unless he takes a lease of 10 l. *per annum*, or shall execute some annual office *in such parish*. In this case the certificate-man took a farm of 10 l. *per annum*, part of which was in *St. John's*, and part in *Amwell*, but the greatest part, together with the house, being stated to lie in the parish that received his certificate, the court held it a settlement there.

An entire
tenement of
10 l. *per ann.*
tho' it lies in
two parishes,
gives a settle-
ment in that
where the
party lives.

Sir George Ludlam, Chamberlain of London, *vers.* Lopez.

BY the statute 6 Ann. c. 16. intituled "An act for repealing an act for the well garbling of spices, and for granting an equivalent to the city of London by admitting brokers," it is taken notice, that the office of garbler of the spices is an inheritance of the city of London, and by them leased out for 300 l. *per annum*, which office and duty it was convenient to abolish, by which the revenues of the city would be diminished; it was therefore enacted that every broker should on his admission pay 40 s. to the chamberlain, and a yearly sum of 40 s. for the use of the city, and that every person acting as a broker without such admittance should forfeit and pay to the use of the mayor, commonalty and citizens of the said city, for every offence the sum of 25 l. to be recovered by action of debt in the name of the chamberlain.

The act of
grace doth
not release
a forfeiture to
which an in-
terest is vested
in another.

The defendant acted as a broker without admittance; and in an action for the penalty the question was, whether this forfeiture was pardoned by the last act of grace?

For the defendant it was insisted, that this is a statute offence of a publick nature, and the action arises *ex maleficio*, like the case of exercising a trade contrary to 5 Eliz. which is always pardoned, unless it be excepted. *Cro. Eliz.* 632. In an appeal of murder the defendant was convicted of manslaughter; and though this was the suit of a private person, yet it was held that the King might pardon the burning in the hand. And as the penalty is but a consequence of the offence, if that be done away, the penalty must fall: and it makes no difference that the penalty is given to the chamberlain, and not to a common informer. 5 Co. 49.

Sed per curiam: This is not to be compared to the case of a common informer, who has no interest vested in him till action brought, whereas here the city has an interest vested upon committing the offense, and they may release the penalty without bringing any action. They are purchasers of this revenue, and the laying a penalty does not make it a publick offense; it is only a security for the duty, that if brokers do not take a licence, they shall pay so much; and if this penalty were not added, the revenue would be worth nothing. 3 *Inst.* 238. is exprefs, that the King cannot pardon, where the action is given to the party grieved; for that would be for him to discharge the interest of another. The offense against 5 *Eliz.* is of a publick nature, and indictable, but this is not. *Et per Eyre* Justice, I much question, whether that case of the appeal be law, for the burning the hand is part of the judgment.

This being upon a point saved at *nisi prius*, the plaintiff had judgment.

Dominus Rex *vers.* Kelley.

Warrant for
treason exe-
cuted in court.

THE defendant having been formerly bound over, appeared the first day of the term upon his recognizance, and Mr. Attorney acquainted the court, that there was a new warrant against him for treasonable practices committed since the last term, which the officer had not been able to execute; and therefore desired leave that it might be executed in court, which was granted, and done accordingly.

Bland *vers.* Pakenhan.

Practice.

THE court held, that the presence of an attorney of C. B. at the execution of a warrant to enter up judgment in B. R. was sufficient.

Dominus Rex *vers.* Tod et al'.

Mandamus to
proceed to
judgment.

BY the statute 6 *Geo. c.* 21. the justices of peace have a jurisdiction given them in some cases to receive an information, and make their determination, upon a seizure of brandy: upon information exhibited by the officer of the customs, the fact appeared not to warrant the seizure, but the justice in favour of the officer refused to dismiss the information, so as the owners might have their

their brandy again; and now *Wearg* moved for a *mandamus*, to compel him to determine the matter, which was granted accordingly.

Green vers. Guantlett.

THE court on motion for a new trial held, that the giving notice of trial at the end of half a year after issue joined, would prevent the necessity of giving a term's notice, till a year after the last notice which was given and countermanded. *Strange pro def.*

Dominus Rex vers. Reader.

THE defendant was convicted for keeping an alehouse without licence, and was thereupon committed for a month as the act directs. After he had lain a fortnight, he brought a *certiorari*, and upon the return of it he was admitted to bail; the court being of opinion, that if the conviction was confirmed, they could commit him in execution for the residue of the time.

Hooper vers. Dale.

THERE being a vacant possession, a lease was sealed upon the premises, and the defendant ejected the lessee, and then gave a warrant of attorney to confess judgment: which was now moved to be set aside, for that the casual ejector can in no case confess judgment. I endeavoured to distinguish this from the common case, where the casual ejector is only a nominal person; but the court said it was a trick, and set it aside.

Sheather vers. Holt.

STRANGE moved for an attachment for a rescue of one taken on a *capias ad satisfaciendum*. And upon the rule to shew cause, the court said, that in regard these motions grew upon them more than they at first intended, they would expect a return in all cases for the future; and therefore discharged the rule.

No attachment on affidavit of a rescue without a return.

N. B. Afterwards upon conference with the Judges of C. B. who grant these attachments every day, the court thought fit to come into that practice again.

Hil. 9 Geo. *Grindney v. Touster*, *Meare v. Gallard*, they resumed the old rule, and required a return. *Young v. Paine*, Trin. 5 Geo. 2. The

The gaoler of Shrewsbury's case.

No attachment for a voluntary escape.

MR. Attorney moved for an attachment against him for a voluntary escape of one in execution for obstructing an ex-cise officer in the execution of his office; but the court refused to grant it, there being no precedent for that purpose; however they ordered him to shew cause, why there should not be an information.

Fleming *vers.* Langton.

Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry upon the demurrer.

THERE were four counts in the declaration, *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire, tam* to try the issue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, That is indeed the course where the issues are carried down to trial before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count; there is no reason why we should force him to carry down the cause to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand.

Barker *vers.* Forrest.

Replication *non est attorn'*, must not conclude *al pais*.

IN C. B. the defendant after special imparlance pleaded his privilege of an attorney of B. R. The plaintiff replied him not an attorney, and concluded to the country. And on demurrer judgment in chief is entered for the plaintiff, but reversed on error, because being on demurrer, the most the plaintiff could have, was a *respondes ouster*. *Et per curiam*, That there must be in this case, because though the replication is ill in concluding to the country, yet the plea is ill too, as coming after an imparlance, though it be a special one.

Lock *vers.* Major.

BY statute 5 Geo. c. 24. §. 30. it is provided, "That a bankrupt's certificate shall be given in evidence, and be a full discharge of any action that shall be brought by any creditor of such bankrupt." A point was reserved at *nisi prius* before Pratt C. J. whether it was not still necessary to prove an act of bankruptcy. And upon debate in open court they were all of opinion it was, for the word *such* was relative, and therefore he must be proved to be such a person as is before described.

Bankrupt's certificate no evidence of the bankrupt-
cy.

Altered by
5 Geo. 2. c.
30.

Anonymous.

THE court granted a rule for the coroner of *Wenlock in com' Salop* to take up a body, in order for a new inquisition, the former having been quashed.

Rule for coroner to take up the body.

Thornton *vers.* Moulton.

At Guildhall coram Pratt C. J.

AT the opening of the books the two brokers met, and the selling broker told the other, he was ready to transfer; the other alleged it was usual to indulge the buyer for two or three days, and that he would find his principal in that time, which the other not disagreeing to, nothing further was done. And for want of having the buyer called at the books the first day of the opening, the Chief Justice ruled it not a good tender, and the plaintiff was nonsuited.

What a tender of stock.

Hopson *vers.* Trevor. In Canc.

THE defendant being the son of the late Master of the Rolls, and under the displeasure of his father, did upon the marriage of his daughter with the plaintiff enter into a bond of the penalty of 5000 l. conditioned to settle one third of whatever estate in lands should come to him on the death of his father. The Master dying without a will, a very considerable estate descended to the defendant his eldest son, who neglecting to make any settlement within the time limited, the plaintiff brought his bill in this court for a specifick performance. The defendant by his answer insists,

Specifick performance decreed where the party insisted to forfeit the penalty. J. C.

2 Will. Rep. 191. 10. Nov. 507

that he ought to be left to sue the penalty, having his remedy upon that at law: but Lord Chancellor decreed a specifick performance, saying it was unreasonable to give an election to the defendant, when the plaintiff could have none; for if the lands to be settled were not of the value of 5000 *l.* he could never resort to the penalty; and on the other hand, if they exceeded that value, it was not just he should be left to it; neither would it answer the intent of the parties, which was to secure a provision for the wife and children by the settlement of the estate; because if the plaintiff was to have the penalty, it must be as a debt due to himself, and this court would have no power to compel him to do any thing out of it for their benefit.

Peele vers. Capel. In Canc.

Bond of resignation,
where to be
allowed.

CAPEL on presenting *Peele* to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that *Peele* should continue to hold the living, paying 30 *l. per ann.* to the nephew. *Peele* makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit; and then *Peele* comes into this court for an injunction, and to have back his 30 *l. per ann.* On the hearing the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made of it: and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it.

Keen vers. Whistler. In C. B.

Where more
costs than da-
mages.

TRESPASS for chasing his cow, and his domestick fowls, viz. hens, geese, &c. with dogs, which dogs were used to bite tame fowl, by whose biting they were killed. On Not guilty, verdict for the plaintiff; and he had his full costs, because this is not a trespass wherein the right of the freehold may come in question.

Blackwell *vers.* Nash.

Intr. Mich. 8 Geo. rot. 212.

IN debt for a penalty, the plaintiff declares, that he covenanted to transfer to the defendant on or before the 21st of September so much stock, and that the defendant *in consideratione praemissorum* covenanted to accept and pay for it; and then avers that he was at the books the 21st of September, *et paratus fuit et obtulit ad transferendum* to the plaintiff, who then and there refused to accept, or pay.

A. is to transfer stock, and
B. to pay for it, the transfer is not a condition precedent.

. On demurrer it was objected by *Acherley*, that *for it* made it a condition precedent. 14 H. 4. 19. 5 Co. 21. 15 H. 7. 18. Dy. 76. 2 Saund. 352. And therefore to intitle himself to this action, the plaintiff should have shewn an actual transfer of the stock, and the rather here, because the covenant was not to pay the money till the day of transfer, which brings this case out of the distinction laid down in *Thorpe v. Thorpe*, Salk. 171.

Reeve contra. Here are mutual covenants, and therefore we need not shew a performance of our part of the agreement; but if we were obliged, a tender is sufficient, especially a personal one, as this must be taken to be from the refusal which is alleged; and it being a personal tender, that helps the want of any averment of the usage of the company, and of staying till the books were shut, according to the case of *Lancashire v. Killingworth*, for this is like the tender Salk. 623. of rent, where a refusal on any part of the day excuses the party from any longer attendance: besides, this declaration is according to the precedents. 1 Brownl. Ent. 14. Br. Red. 109. Lutw. 226. Lev. Ent. 30, 44.

Et per curiam, *In consideratione praemissorum* is in consideration of the covenant to transfer, and not of an actual transferring, for which the defendant has his remedy; or if it were, a tender and refusal would amount to a performance: in all these cases the great question is, who is to do the first act: but when the transfer is to be upon payment, there is no colour to make the transfer a condition precedent.

Judicium pro quer' nisi, but enlarged to next term on the impertinency of the defendant's counsel, who alleged he had new points. Hil. 9 Geo. the plaintiff had judgment without argument.

Trin. 10 Geo. the judgment was affirmed in the Exchequer Chamber. Dominus

Dominus Rex *vers.* Decan' et Capitul' Dublin.

*J. C. 2. Brep. Parl. Cas. 554.
1. Wm. 348.*

2. Whether error will lie on the award of a peremptory *mandamus*.

ERROR *e B. R. in Hibernia* of the award of a peremptory *mandamus* to admit Robert Dowgate to his stall in the choir and his voice in the chapter.

The first *mandamus* recites, that the said Robert had been legally instituted and inducted to his stall and voice, which the dean and chapter had refused him; *ideo, &c.*

After an *alias* and *pluries* they return, that Hen. 8. by his letters patent under the great seal of Ireland, dated 10 May, Anno Regni 33. gave to the dean and chapter and their successors a power to make statutes and ordinances for the better government of the church, by virtue of which they ordained, that every person before he should be admitted to his stall in the choir and his voice in the chapter, should take his corporal oath before the dean and chapter for the time being, of canonical obedience to the dean, and to observe the statutes and customs of the church, and to keep the secrets of the chapter. That they were ready to have admitted the said Dowgate to his stall and voice, but that he refused to take the said oath, though requested so to do, *et ea de causa* they cannot admit him. Then the entry goes on with a *quia videtur cur'*, that the return is insufficient, *ideo concedatur, et per cur' hic ordinatum est, quod fiat breve de peremptorie mandamus*.

Upon error of this the general errors are assigned, that no such writ ought to have been awarded, and that the return should have been allowed. The Attorney General here pleads *in nullo est erratum*.

Fazakerley pro queren. in errore. That a writ of error will lie in this case, though that is a point never yet determined: it is the policy of the law, that no one court should be intrusted with the sole determination of any man's property; for which reason it furnishes the party with writs of error, bills of exceptions, demurrers to evidence, &c. If the validity of this return had been determined in an action, no body will say, but a writ of error would lie; and is not the very same matter put in judgment, only in a more summary way? and is not property more and more every day the subject of *mandamus's*? 2 Cro. 6. says all proceedings of courts of justice ought to be examinable in another place; and in the case of *Asbby v. White* it was held, that a writ of error would lie on the award to remand, where the court refused to bail.

Error lies on the award to remand, where the court refuses to bail.

Taking

Taking it therefore for granted that a writ of error will lie, I shall proceed to mention my exceptions to the *mandamus*.

1. Here is no title to the archdeaconry set out, only that he was collated, instituted and inducted: in a *quare impedit* they always shew a vacancy.

2. The writ is *felo de se*, and shews it to be unnecessary, for being inducted he has a right to all the incidents of his office. Suppose an house was annexed to the archdeaconry, would this court grant a *mandamus* for that? No surely, they would leave him to his ejectment: you will indeed help him into the office, without which he could not maintain an ejectment. The case of a parson is the same, for he is put to sue for his tithes, and cannot have a *mandamus* to the parishioners to set them out. In the case of corporation officers indeed you grant a *mandamus* to deliver the *insignia* after the party is sworn in; but that is because the office is annual, and it is necessary the mayor should have them immediately, in order to command the more respect.

3. This is an ecclesiastical office, and therefore the right may not be so properly determinable on a *mandamus*, as before the ordinary.

Reeve contra. A writ of error may by the same reason lie on the award of the first writ of *mandamus*, as on the peremptory one; and then it is easy to see, the delay would be infinite.

The property is not determined on this writ, for it gives the party no right whatsoever; on the award of a *habeas corpus* error will not lie. 8 Co. 127. And in the case of the bishop of *St. David's* the entry was, that the party prayed a prohibition, *et ei non conceditur*, and yet no error was held to lie of it. And in the case of *Strode v. Palmer*, Trin. 2 Geo. where this point was stirred but not determined; it was however resolved by all the court, that it would be no *superfedeas* to the peremptory *mandamus*; and therefore I cannot imagine what use it will be of, for as the *mandamus* gives no right, he has nothing to make restitution of upon the reversal.

Ld. Raym.
545.
Error lies not
on denial of
a prohibition.
Lill. Ent. 248.

But if error will lie, yet the return is insufficient, and therefore the peremptory *mandamus* was well awarded. 1. Because the by-law is void, in imposing an oath on a person not obliged to take one, and in giving themselves a power to administer it. Besides, he is not a member till admitted, and therefore this is to bind one not a member. 2. They have not set out, when the by-law was made, Where a corporation has a power to make statutes they cannot give themselves a power to administer an oath.

3 Geo. 2. Inst.
179. Cro. Cha.
25. 26. 1. Ro.
Rep. 5.

made, perhaps it was since our induction. 3. They say he was requested to take the oath, but not that it was tendered to him.

As to the exceptions to the *mandamus*, I shall content myself with this general answer, that the party here has no occasion to shew his title; and it was never intended he should be as exact, as if he was answering an information in nature of a *quo warranto*.

Fazakerley. The case of *Strode v. Palmer* is very different from this, for that was a case upon the *mandamus* act, and the judgment of the court was founded on the words of that statute, which are, "That if the return be adjudged insufficient, a peremptory *mandamus* shall issue without delay."

Chief Justice. Here are three questions, 1. Whether the *mandamus* be good? 2. If the return be so? And, 3. If the writ of error will lie?

A *mandamus* is only to give a legal, not an actual possession.

As to the first, it is true we grant *mandamus's* where otherwise the party would be without remedy, as to be sworn in; but if that be done, we go no further, but leave him to get an actual admission how he can: we give him a legal possession, and then leave him to his remedy. Indeed in the case of *mandamus's* to restore, we go further: but that is because he had an actual possession before: and the reason why in the other case we do not meddle with the actual possession is, because when we have given him a legal one, he is by law as much intitled to every right belonging to the office, as if he had the actual possession, and may maintain that right without our assistance, even against another who is in possession of the office. Consider what would be the consequences if we should interpose: here are two persons who both claim a title to the same office, and each of these have an equal right to our assistance; we grant each of them a *mandamus* to be admitted, which writs are executed on behalf of both; what then are they to do when they come together? neither will submit to the other, and so there is no remedy but to fight it out, by which means we are the instruments of breaking the peace. He that has the legal possession, may maintain his right against any disturbances, we only put him in the way to pursue his proper remedy. Here has been an induction, and that is sufficient; and therefore I think the *mandamus* destroys itself. As to the case of the *insignia*, that depends upon the particular reason that has been mentioned.

2. But if the writ were proper, then the return is ill: can they force an oath upon a man not to reveal secrets? I am sure it is a very dangerous one: and as to the canonical obedience, they may enforce

enforce that by ecclesiastical censures without an oath. Dr. Sherlock's case was founded on an act of Parliament, which said he should have a stall and voice; and till that was assigned, he was not in legal possession of the prebend. *Ante* 159.

3. As to the third point, I am doubtful whether the writ of error will lie; if the return had been allowed, I should think it hard to re-examine it.

Powys Justice. I think the *mandamus* is not proper, and that the case of the *insignia* stands single on that particular reason, that without them no body will give the mayor due respect.

Eyre Justice. I think the *mandamus* is good, for as to the want of title, here is as much set out as is done in the case of corporation officers, where they only say *debito modo electus*. As to the main point, I think a *mandamus* is very proper to admit a man to the exercise of his office; and that if a common-council-man, after swearing in, should be denied admission into the council-room, he might have a writ for that purpose. And I take Dr. Sherlock's case to be the same with this, for he was prebendary by virtue of the act of Parliament, without any further ceremony, and had the same right to his seat and voice as this man has; and if a *mandamus* will not lie, I do not see what other remedy he has to get into his stall, unless it be by force.

As to the return it is certainly ill, for it is not the charter but their own by-law that gives them power to administer the oath: in the case of corporations where the charter doth not empower any body to give the oath, they are forced to get a *dedimus* out of Chancery. Neither is the by-law well set out, for it is only *inter statuta ordinatum est*, without shewing when or by whom it was made.

Where the charter gives no power to administer the oath of office, there must be a *dedimus* for that purpose.

This entry of the award of a peremptory *mandamus* is no judgment, for want of *consideratum est*, which should have been in. *Mich. 10 W. 3. rot. 83.* the writ recites, that the return was held insufficient, *per quod consideratum fuit, quod fieret breve de peremptorie mandamus tam in complemento judicii quam in executione ejusdem.* *16 Car. 2. rot. 135. Rex v. Majorem de Maidstone.* *29 Car. 2. rot. 44. Mich. 3 W. 3. rot. 139, 142. 7 W. 3. rot. 60.* are all so. But I do not find they ever entered up a formal judgment.

This award therefore of a peremptory *mandamus* is a judgment of which error will lie; and the party will have the effect of it in superseding the writ, if reversed.

Fortescue Justice. I think it is hard to maintain, that a writ of error will lie, because without *ideo consideratum est* it is no judgment: it is against the nature of *mandamus*'s, which are *festinum remedium*, and great inconveniencies will follow, where the writ is to deliver the *insignia*, or publick records. *Ryley* says they were formerly no more than letters, and now the disobedience of them is only a contempt. Entries are made of contempts, and yet I believe error was never brought. *Bags*'s case was the first judicial *mandamus*, and till 12 *W.* 3. they were never entered of record, when a rule was made, that they should be entered of the same term they come in.

As to the point of the *mandamus*, I am inclined to be of my Lord Chief Justice's opinion, that it will not lie where there is a legal possession, and there was not that in *Sherlock*'s case, for he was never sworn.

It was afterwards argued a second time *Pasch.* 8. *Geo.* when *Wearg pro quer' in errore* made two points, 1. Whether the writ of error lay; and, 2. Admitting it did, whether the judgment was erroneous.

As to the first point, appeals are a privilege much favoured by law, and therefore a new erected jurisdiction is not exempt from them. *Salk.* 263. A *mandamus* is now become a formed writ, and like other writs must bear *teste* in term. 2 *Keb.* 91. It is like a civil action, the party must shew a title, and the return must either admit or deny it, and when the proceedings are closed, the judgment is entered with an *ideo consideratum est*. A writ of error lies upon a fine, and yet that is only an agreement of the parties upon record.

The rights that are determined upon these writs are many times of an high nature, and are of consequence to the publick in keeping out an improper, or bringing in a rightful officer: and it is of consequence likewise to the party himself, who has his private right bound by such a determination as is made upon this writ.

It was objected, that if error will lie upon the award of the peremptory *mandamus*, it may as well lie upon the first writ, and then the delay would be infinite. But I take it to be no consequence, that if it lies on the last, it must lie also on the first; for I look upon that to be of the nature of an interlocutory judgment, of which error will not lie, but the party must stay till the cause is closed.

The inconvenience of delay may be avoided, by construing this writ of error to be no *supersedeas*, as they did in the case of *Strode v. Palmer*, *Lill. Entr.* 248. and in many other instances, which might be put. 1 *Mod.* 285, 106. 1 *Vent.* 266. 2 *Lev.* 120. 1 *Sid.* 184, 44.

But then it is objected, if it be no *supersedeas*, to what purpose should you bring it? Answer; to have him turned out again, if the judgment be reversed: that reversal may put him in the same condition as when he brought the writ.

2. Taking it therefore for granted, that a writ of error will lie, I shall proceed to shew wherein the judgment is erroneous. It will be admitted, that if the original *mandamus* ought not to have been granted, then every thing done upon it must fall. A *mandamus* is not to give a right, but only a capacity of asserting it, which the party cannot do till he has a legal possession; if he has that, it is all the writ can give him, and then he stands in no need of any writ. In this case it appears, the party was in possession of the office, which gave him a right to his stall and voice, and he might as well have taken the writ to the verger or the sexton, or to have a house, or his dividend; in which cases he having such a right as will enable him to maintain an action, the law leaves him to that. Dr. *Sherlock's* case is widely different, for there the letters patent were no more than a standing nomination, which left the right of admission in the dean and chapter as it was before, and so was no more than the common case upon a bare nomination or election; but the party here has at the time of suing out the first *mandamus* all that which Dr. *Sherlock* did not enjoy till the peremptory *mandamus* gave it him.

Pengelly Serjeant *contra*. That the *mandamus* well issued, and that the writ of error would not lie.

As to the *mandamus*, it appears that *Dowgate* has a right to a stall, and in consequence of that he must have a remedy to come at it. It is not pretended, that a *quare impedit* will lie, nor can he bring an assise, he having the office already, and that for which he is contending, being only a particular privilege annexed to it. He cannot have an ejectment, it not being such a thing whereof the sheriff can give possession; nor will an action upon the case answer his purpose, because in that he cannot recover his stall, but only damages for being kept out.

As therefore he can have none of these remedies, he is under a necessity of praying a *mandamus*, which lies for him on behalf of the crown, as he is an officer appointed by the royal charter.

I wonder to hear it said we are already in possession of every thing the writ can give us, when it appears by the writ and return, that though we are archdeacon, yet we have no sort of possession of this particular franchise. In the case of the *insignia* the officer is not without remedy, if a *mandamus* should not be granted, for no doubt he may maintain an action of trover; but the reason you do not put him to that is, because damages will not answer the purpose, which reason holds equally in our case. 1 *Lev.* 119. a *mandamus* was granted for such a privilege as this annexed to an office, for that was to give an alderman his precedence. 1 *Vent.* 188. 2 *Roll. Rep.* 482. *Pal.* 51. It is no objection, that this office is of a spiritual nature. Sir *T. Jones* 199. *F. N. B.* 34. *D.* a writ to induct to a stall.

2. Whether the *mandamus* was well granted or not, will be immaterial here, if I shew that no writ of error will lie upon it. It can be of no consequence or inconvenience if error does not lie, because the *mandamus* neither gives, nor concludes the right. Suppose there should be a reversal, who can pray that the party may be put out again? Error will not lie on a *habeas corpus*. 8 *Co.* 127. Nor on a fine imposed by the court; and yet these may be matters of great consequence to the parties: here is no body else contending for this stall, or who can demand a restitution; and if it had ever been imagined a writ of error would lie, we must have met with it before now.

Wearg replied. The reason why the party cannot bring a *quare impedit* is, because that is not his proper remedy, which he must seek by action upon the case. A *mandamus* will not lie to command the providing necessities upon a visitation, but the party must sue for procurations. In the case of precedence the alderman could have no action, and therefore the *mandamus* might be proper.

Adjournatur; and this term it was argued *ex parte defendantis in errore* on the single point of the writ of error, upon which only the court delivered their opinions.

Chief Justice. This cause being argued *ex parte*, I suppose the plaintiff in error gives it up. Several matters have been stirred in the case, which might deserve consideration, if we could properly come at them; but as we are all of opinion that the writ of error
does

does not lie, it is not necessary to enter into the debate of them. A writ of error is calculated to restore the party to somewhat that is lost; the *mandamus* gives no right, not even a right of possession; so that if the judgment should be reversed, still the same right would subsist in him, which makes the reversal signify nothing. To which *Powys* Justice agreed. *Et per Eyre* Justice, A writ of error only lies on what is properly a judgment, which this is not. I was indeed inclined to think it a judgment from the entries that I mentioned formerly; but upon looking further into it, I find that the entries, where returns have been allowed, do not warrant that opinion, for they are without an *ideo consideratum est*. In all *procedendo's* the entry is with an *ideo consideratum est*, and yet it is certain error will not lie, neither will it on the return of a rescue. The entry in the case of the *Aylesbury* men is, *Super quo visis et per curiam hic plenius intellectis omnibus et singulis praemissis, pro eo quod videtur curiae hic quod causa captionis et detentionis supranominati A. B. non pertinet ad hanc cur', ideo remittitur*, without an *ideo consideratum est*; which entry was made on great consideration, and is an argument the judges thought that not to be a case relievable by writ of error. *Et per Fortescue* Justice, Entries of *mandamus's* are of late date; perhaps in *Ireland* they do not enter them yet: the party cannot traverse this return, and why then should he bring a writ of error? There would be no end of proceedings, if all sorts of officers that are intitled to a *mandamus* should be hung up by writs of error. *Per curiam*: The writ of error must be quashed.

Afterwards a writ of error was brought in Parliament, and the judgment of *B. R.* in *England* affirmed,* with 60 *l.* costs.

Hilary

Hilary Term

9 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Between the Parishes of Burlescome and Sampford
Peverell.

Executing the
office of ti-
thingman
gains a settle-
ment.

THE sessions on a special order adjudge, that executing the office of tithingman would not gain a settlement. *Et per curiam*, The order must be quashed, for this is an annual office in the parish within the words and meaning of the act of Parliament.

Between the Parishes of St. Michael in Bath and Nunny
in com' Somerset.

Order to re-
move a mar-
ried woman is
good unless it
appears she is
sent from her
husband.

ORDER of removal, reciting that the wife of B. who is now living, and C. his child, had intruded, &c. and were likely, &c. and that the place of settlement of the wife and child was in *St. Michael*, they are therefore removed thither. It was moved to quash the order, because it did not appear, the husband was at the time

time of the removal in the parish of *St. Michael*, so that it may be they sent the wife away from the husband. *Sed per curiam*, We cannot intend he was not; if he was in the parish from which she was sent, that indeed would vitiate the order; but as neither of these facts appear against the order, to satisfy us that it is bad, we are not to presume it to be so, and therefore it must be confirmed.

Hodgkins et ux' *vers.* Corbet et ux'.

NORTHER moved for a prohibition for these words spoken in *London*, "You are a cuckoldly dog, and bid the bitch your wife come out"; and cited *Hil. 12 Ann. Evans v. Horwood*, where "She is with child," spoken of a single woman, was held tantamount to calling her whore, and a prohibition went. So *Pasf. 1 Geo. Wilborn v. Caddy*, the wife libelled for calling her husband cuckold, and a prohibition was granted. *Et per curiam*, Formerly it was held that words tantamount were not within the custom, but the later resolutions have denied that case in *Lutw. 1042*. And *Mich. 11 W. 3. B. R. Smith v. Glass*, the words spoken in *London* were, "She was never married, and what is her hopeful son;" and by the opinion of the whole court there was a prohibition. There must be a prohibition in this case.

Words tantamount are within the custom of *London*.

Alcock *vers.* Carter.

MR. Atwood moved the common motion to set aside so much of the assignment of errors in a cause out of *Ireland*, as related to the want of a warrant of attorney; which was opposed by *Strange*, who produced an affidavit sworn before one of the Judges in *Ireland*, with a certificate from the proper officer, that there was no warrant filed; and also an affidavit of the agent here, that he received both from *Ireland*, and believed them to be authentick; and insisted that it now appearing they were not sham errors assigned merely for delay, the reason upon which the common motion is made failed. *Et per curiam*, This is sufficient to satisfy us that there is some foundation for our sending a *certiorari*, and therefore the errors must stand. *Strange* moved for time till the next term to return a *certiorari*, which was granted accordingly.

Under what circumstances the court will allow want of warrants of attorney to be assigned on a writ of error out of *Ireland*.

Payne *vers.* Fry.

The clerks of
a prothono-
tary of C. B.
are not inti-
tled to privi-
lege.

THE defendant pleaded in abatement, that he was one of the clerks of Sir G. Cooke, prothonotary in C. B. and *Squib* moved to set it aside. Upon a rule to shew cause, *Strange contra* produced the affidavit annex to the plea, wherein the defendant swore, that he served his clerkship with a Common Pleas attorney, and that he had for many years acted as an attorney or solicitor, and followed no other employment. And after consideration the court set aside the plea, being all of opinion, such clerks had no privilege at all, they not being sworn as attornies are, nor ever acting as clerks in the prothonotary's office. And that it was not sufficient for the prothonotary to enter their names in his book. As to such clerks as were actually employed under him, for so long as they continued in that employment, they would be privileged, but no longer; as in the case of a Judge's clerk; and an old rule 8 *Car.* was cited, where they were restrained from practising as attornies.

Dominus Rex *vers.* Gage.

THE defendant was convicted on 5 *Ann. c. 14.* for using a greyhound in killing four hares, *per quod* he forfeited 20 *l.*

Where ju-
stices have
power to con-
vict on oath
of one wit-
ness, they
may convict
on the confes-
sion of the
party.

Reeve excepted to the conviction, that the act of Parliament had only given the justices jurisdiction to convict upon the oath of one or more credible witnesses, whereas this was upon his own confession, which he insisted the justices had no power to take; and it follows in the act, that the person so convicted shall forfeit, which word *so* is relative to the former method by oath of one or more credible witnesses: and he put the common case upon the removal of a poor person, which must be upon complaint of the churchwardens or overseers, the justices having jurisdiction only in that manner.

Sed per curiam, (praeter Eyre J.) The conviction must be confirmed. The intent of mentioning the oath of one witness was only to direct the justices, that they should not convict on less evidence: suppose the confession had not been before the justices, but before two witnesses who had sworn it; that would be convicting him on the oaths of witnesses, and yet the evidence would not be so strong as this. By the civil law confession is esteemed the highest evidence, and in some cases, though there are one hundred witnesses, the party is tortured to confess. Here the justices had a better evidence

evidence than the oath of any single witness, and it is a monstrous thing to say that a better sort of evidence shall not do.

Eyre J. contra, thought there was no occasion to carry this act of Parliament so far, the 22 & 23 *Car. 2. c. 26.* giving power to convict for this offense upon confession, with a different penalty, and that it ought to have been a conviction upon that statute. The conviction was confirmed.

Dominus Rex vers. Sarah Salisbury.

SHE was committed to *Newgate*, for stabbing a gentleman with Practice. a knife, so that his life was despaired of: and having obtained a *habeas corpus* out of the King's Bench, the day before she was to be brought up she moved, that a physician and surgeon of her own nominating might be permitted to be present at the dressing the gentleman's wound, so as to be able to satisfy the court that he was out of danger, in order that they might bail her. *Sed per curiam*, There never was a motion of this nature, especially so early as this is; the course is, for the friends of the party injured to lay his condition before the court when they oppose the bailing: if they do not do it, then we may order such an attendance for our own satisfaction; but at present the defendant has no right to demand it.

Dominus Rex vers. Harvey et al'.

UPON a motion for an information against the defendants, to shew by what authority they acted as burgessees, having never been admitted; the only act alleged was, their voting for Parliament men at the last election. The defendants by affidavits shewed they were inhabitants of the borough, and that as such they had a right to vote, though they were no burgessees; but did not deny their voting as if they were burgessees. *Per curiam*, Since they had a right to vote, we will not inquire into that question, which is more properly determinable in the House of Commons. The rule was discharged.

The court will not grant information where the only acting is voting for Parliament men.

Mr. Dottin's case.

HACKET agreed to assign a lease to *Sutton*, who sent for *Dottin* an attorney to take the deeds and peruse them. *Dottin* drew an assignment, and then *Sutton* paid him for it and took back the deeds. And now *Hacket* moved for a rule on *Dottin*, to deliver him

In what cases the court will order an attorney to deliver deeds.

him the deeds. But upon laying the case before the court, they would make no rule upon the attorney, it appearing to be a fair transaction in delivering back the deeds to his own client.

Lord Coningsby's case.

No new ejectment to be brought till costs paid of the first.

HE brought an ejectment, and had a rule for a trial at bar; but it being upon the demise of a wrong person, he delivered new ejectments, and coming again for a trial at bar, the court would not grant it, but upon payment of costs of the former ejectment.

James *vers.* Hatfeild.

At Guildhall coram King C. J.

What the guardian said admitted as evidence against the infant.

AN infant brought an action of assault, and declared *per guardianum*. And to prove that his witness was the promoter of the cause and at the expence of it, the Chief Justice allowed the defendant to give the guardian's declaration to that purpose in evidence, he being a person liable to costs.

Easter

Easter Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Bailee vers. Vivash.

IN trespass for taking away goods the defendant pleaded tender of amends, and on demurrer judgment was given for the plaintiff; the 21 *Jac. 1. c. 16.* giving such plea only in the case of an involuntary trespass with a disclaimer, and so is 2 *Roll. Abr.* 570. Amends not pleadable to a voluntary trespass.

Dominus Rex vers. Wells.

THE court granted a *certiorari* for the defendant to the *Old Bailey* to remove an indictment for forgery; the defendant appearing to be a man of good repute, and the prosecution upon slight grounds. Indictment removed from *Old Bailey.*

him the deeds. But upon laying the case before the court, they would make no rule upon the attorney, it appearing to be a fair transaction in delivering back the deeds to his own client.

Lord Coningsby's case.

No new ejectment to be brought till costs paid of the first.

HE brought an ejectment, and had a rule for a trial at bar; but it being upon the demise of a wrong person, he delivered new ejectments, and coming again for a trial at bar, the court would not grant it, but upon payment of costs of the former ejectment.

James *vers.* Hatfeild.

At Guildhall coram King C. J.

What the guardian said admitted as evidence against the infant.

AN infant brought an action of assault, and declared *per guardianum*. And to prove that his witness was the promoter of the cause and at the expence of it, the Chief Justice allowed the defendant to give the guardian's declaration to that purpose in evidence, he being a person liable to costs.

Easter

Easter Term

9 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir Robert Eyre, *Knt.* } *Justices.*

Sir John Fortescue Aland, *Knt.* }

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Bailee *vers.* Vivash.

IN trespass for taking away goods the defendant pleaded tender of amends, and on demurrer judgment was given for the plaintiff; the 21 *Jac. 1. c. 16.* giving such plea only in the case of an involuntary trespass with a disclaimer, and so is 2 *Roll. Abr.* 570. Amends not pleadable to a voluntary trespass.

Dominus Rex *vers.* Wells.

THE court granted a *certiorari* for the defendant to the *Old Bailey* to remove an indictment for forgery; the defendant appearing to be a man of good repute, and the prosecution upon slight grounds. Indictment removed from *Old Bailey.*

Macdonnel *vers.* Welder.

Hil. 9 Geo. rot. 273.

An entry before the commencement of the lease will not avoid the payment of the rent reserved.

IN replevin the defendant avows for rent under a lease dated 24 June; *habendum a praed' 24 die Junii, &c. virtute cujus* the plaintiff entered the said 24th of June.

On demurrer in *C. B.* it was objected, that the plaintiff was a disseisor by entering the 24th, when the lease was not to commence till the next day, and consequently the possession was not under the lease, but by virtue of a tortious fee.

But after consideration, judgment was given for the avowant; the court being of opinion, there was a great difference between this case, and an ejectment, where the plaintiff who claims a term does at the same time shew he has gained a tortious fee; whereas here be the entry tortious or not, it cannot discharge the contract for payment of the rent. *Cro. El.* 169. 2 *Leon.* 99. 1 *Roll. Abr.* 65. The judgment of *C. B.* was affirmed.

Hollister *vers.* Coulson.

A *latitat* prevents the statute of limitations.

1 *Sid.* 53, 60.
1 *Sty.* 156.
L. Raym.
1441.

THE defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied a *latitat*; and the court on demurrer held it well enough, without shewing a bill of *Middlesex. Judicium pro quer'.*

Hayward *and* the Bank of England.

In what time a goldsmith's bill must be tendered.

THE plaintiff, who kept cash with the Bank, on *Saturday* left a note for 50 *l.* on *Cox and Cleeve*: on *Monday* they gave it to the runner, who left it at the shop in the morning, where they cancelled the note; but when he called in the afternoon for the money according to his usual practice, he found the bankers had stopt payment; whereupon he took a new note of the same tenor and date. And *King C. J.* directed the jury, that it would be dangerous to suffer persons to deal with notes in this manner, and said the Common Pleas was of that opinion in the like case. But however he directed they should only find the value of the note when cancelled, upon which the jury found 25 *l.* the goldsmiths having paid 10 *s.* in the pound.

Thompson *vers.* Berry. In C. B.

TRESPASS for breaking his close and chafing his bull. Verdict for the plaintiff and 1 s. damages. And the question was, if he should have any more costs than damages; and held by the court that he should have his costs, because the 22 & 23 Car. 2. c. 9. extends only to such actions of trespass where the freehold may probably come in question. *Vide Raym.* 487. 3 *Mod.* 39. And how could the freehold come in question upon chafing of a bull? Where no more costs than damages.

Rawbone *vers.* Hickman.

IT was moved in arrest of judgment, that the record was, *et Jeofail. praed' querens* (instead of *def.*) *similiter*, so no issue joined: but the court held it was aided. *Cro. El.* 435, 904. And *Mich.* 5 Geo. 2. on the authority of this case the court would hear no argument on the like objection.

Trinity

Trinity Term

9 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Anonymous.

*Mandamus to
commit admi-
nistration.*

SYRANGE moved for a *mandamus* to the official of the Bishop of Gloucester, to commit administration to the widow of an intestate. *Sed per curiam*, That will be to deprive the ordinary of his election, in granting it to her, or the next of kin; therefore take your *mandamus* generally, to grant administration of the goods of the intestate.

Dominus Rex *vers.* Hotch.

*Indictment on
5 Eliz.*

MR. Eyre moved to quash an indictment on 5 *Eliz. c. 4.* where it was averred to be a trade used at that time in *Great Britain*, instead of *England*; and after a rule to shew cause it was made absolute without opposition.

Trin. 13 Geo. Rex v. Parish, another quashed on the authority of this case.

Dominus Rex *vers.* Athoe senior' et junior'.

THE defendants were convicted at *Hereford* assizes for a murder committed in *Pembrokeshire*, which is an ancient *Welch* county, and no part of the lordships marchers in *Wales*; and at the assizes they moved in arrest of judgment, that the 26 *H. 8. c. 6.* did not extend to all the principality of *Wales*, but only to the lordships marchers, where the inconvenience only was recited to be: Mr. Justice *Fortescue*, before whom they were tried, thinking it proper, a point of so great consequence should be solemnly determined, ordered a *certiorari* and *habeas corpus* to be brought, by virtue of which the defendants and the conviction were both brought before the court of *B. R.* And after hearing of counsel on both sides, and consideration of the several statutes of 26 *H. 8. c. 4.* 26 *H. 8. c. 6.* and 34 & 35 *H. 8. c. 26.* the whole court were unanimously of opinion, that the Judges of assize in the next adjacent *English* county had a concurrent jurisdiction throughout all *Wales* with the justices of the grand sessions; and consequently the defendants were well tried at *Hereford*. The defendants thereupon received sentence of death, and being in the custody of the marshal were executed at the watering place by *Kent-street*, being the usual place of execution for his prisoners.

Murders and felonies in any part of *Wales* may be tried in the next *English* county.

Lilly *vers.* Hedges.

THE plaintiff brings an action against *Hedges* only, on a covenant entered into by him and *Griffin*, that they and each of them will account for all rents that they or either of them shall receive of the plaintiff's estate; and assigns the breach, that *licet* *Hedges* and *Griffin* received 7000 *l.* yet they nor either of them ever accounted.

Where the covenant is joint and several, in an action against one only the breach may be assigned in the neglect of both.

After verdict for the plaintiff *Wearg* moved in arrest of judgment, that though the plaintiff had an election to bring either a joint or separate action; yet this was neither joint nor several, being against one only for the neglect of both. *Sed per curiam*, The action is well brought, perhaps the other never sealed the deed, and it is no new thing for one man to covenant for the act of another. The plaintiff must have judgment.

Between the Parishes of Allhallows on the Wall and St. Olave in Surrey.

A. is bound to B. but serves C. his settlement is in C.'s parish.

UPON a special order of sessions the case was stated, that an apprentice was bound to *A.* in one parish, but by agreement served *B.* in another parish, and the sessions settle him with *B.*

Et per curiam, The order must be confirmed. This is exactly the case that was in this court, *Mich. 3 Geo. between the parishes of Holy Trinity and Shoreditch*, where *Ferrer* was bound to *Truby* with intent to serve *Green* (as he did); and the court upon a special resolution adjudged the settlement to be with *Green*. *Ante 10.*

Grumble *vers.* Bodilly.

Where there is judgment pro def. in ejectment, costs shall be paid before a new one brought.

THERE was a verdict for the defendant in ejectment, and the plaintiff brought a writ of error, and a new ejectment. And it was moved to stay the proceedings in the second ejectment, till the costs of the first were paid. *Salk. 255, 258. Et per curiam*, Unless the plaintiff can satisfy us, that the writ of error is brought with some other view than to keep off the payment of costs, we will not suffer the plaintiff to proceed in his new ejectment. And he not shewing any thing else, the proceedings were stayed, unless costs paid in a fortnight.

Woolley *vers.* Briscoe.

Surplusage.

IN a stock cause the defendant pleaded that the contract was not registered before the first of November 1720. *secundum formam statuti in hujusmodi casu editi et provisi*. The plaintiff replies, that it was registered *secundum formam statuti*; upon which they are at issue, and it is found for the plaintiff.

It was moved in arrest of judgment, that this was an immaterial issue, because the act of Parliament does not require such registry till the first of November 1721. and then the plea being only to the first of November 1720. upon which the issue is joined, the jury could not find it to be registered according to the directions of the statute.

Sed per curiam, The time was impertinently mentioned in the plea; the issue is joined upon that part which is only material, *viz.* the

the registry *secundum formam statuti*, and therefore the rest must be rejected as surplusage. If not, then the replication is ill, and so is the plea, and then the declaration must stand, and the plaintiff have judgment.

Dominus Rex vers. Ford.

CONVICTION on 3 *Car. 1. c. 3.* for keeping an alehouse without licence: and *Fortescue* objected, that in the act there is a proviso to exempt persons who have been punished by the former law of 5 & 6 *E. 6. c. 25.* and therefore it should have been said he had not been proceeded against upon that act. Conviction for keeping an alehouse.

Sed per curiam, That coming in by way of proviso, he should have insisted on it in his defence; it appears he was asked what he had to say, and therefore we may reasonably presume he had no such defence to make. The conviction was confirmed.

Dominus Rex vers. Robbison major' de Helstoun.

SERJEANT *Pengelly* moved for a *mandamus* to him, to proceed to an election of a new mayor upon the next charter day; it appearing by affidavit, that under a clause for holding over he had been in possession four years; and it being doubtful whether, where there is a charter day, there can be an election at any subsequent day, the court granted the *mandamus*. Mandamus to proceed to election where a clause for holding over.

Cook vers. Wingfield.

THE word *strumpet* was held to be within the custom of *London*; but the defendant not coming for a prohibition till after sentence, the court denied a prohibition on the authority of *Argyle v. Hunt*, though it appeared on the libel to be spoken in *London*. Strumpet tantamount to whore.

Dominus Rex vers. Inhabitantes de Little Dean.

IT was stated, that a man took a lease for seven years, and objected that it might be only by *parol*, and then it is void for the whole, and there can be no settlement. *Sed per curiam*, Then it should have been stated to be by *parol*; we must take it to be by deed, otherwise it is no lease at all. Order confirmed. The court will presume a lease to be by deed.

Gray

Gray *vers.* Mendez.

Mich. 9 Geo. rot. 346.

The statute of limitations runs notwithstanding a bankruptcy.

CASE by the assignee of the commissioners of bankruptcy, the defendant pleads *non assumpsit infra sex annos*, to which the plaintiff replies the bankruptcy, and assignment, and that the cause of action arose within the six years, before the assignment.

On demurrer the court held the replication to be ill, because when the six years were once begun, the statute runs over all *mesne* acts, such as coverture, and infancy, in the case of a fine. 1 *Lev.* 31. And it would be to defeat the statute, as to all simple contracts, if an assignment at the end of five years and an half was to set all at large again. *Judicium pro defendente.*

Horspoole *vers.* Harrison.

A trader may be sued by his degree, and the writ shall not abate unless he pleads another degree.

IN an action by original against the defendant as of such a place yeoman, he pleaded in abatement, that he was a lime merchant, and not a yeoman: and on demurrer the court held it an ill plea, and awarded a *respondes ouster*, upon this ground, that every man, be he a trader or not a trader, has a degree by which he may be denoted; and having a degree, (if he has a trade likewise) it is in the election of the plaintiff to sue him by one or the other; and if he sues him by his degree, it is not enough for the defendant to say he is of such a trade, because he does not give the plaintiff a better writ. In this case therefore the defendant should have shewn himself to be of a degree higher than a yeoman, and that would have abated the plaintiff's writ, and have given him a better. This was ruled upon the authority of a former case, where a man was sued as yeoman, and he pleaded he was a horner, and the court awarded a *respondes ouster*.

Jones *vers.* Pearle.

Pas. 9 Geo. rot. 21.

Innkeeper cannot sell the guest's horse for keeping, except in London.

IN trover for three horses, the defendant pleaded, that he kept a publick inn at *Glastenbury*, and that the plaintiff was a carrier and used to set up his horses there, and 36 *l.* being due to him for the keeping the horses, which was more than they were worth, he detained

detained and sold them, *prout ei bene licuit*: and on demurrer judgment was given for the plaintiff, an innkeeper having no power to sell horses, except within the city of *London*. 2 *Roll. Abr.* 85. 1 *Ven.* 71. *Mo.* 876. *Yel.* 67. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again.

Acheson vers. Fountain.

Mich. 9 Geo. rot. 363.

UPON a case made at *nisi prius coram Pratt C. J.* it appeared that the plaintiff had declared on an indorsement made by *William Abercrombie*, whereby he appointed the payment to be to *Louisa Acheson*, or order, and upon producing the bill in evidence it appeared to be payable to *Abercrombie*, or order; but the indorsement was only in these words, "Pray pay the contents to *Louisa Acheson*;" and therefore it was objected, that the indorsement not being to order did not agree with the plaintiff's declaration.

The order of an indorsee may sue on a general indorsement to him only.

But upon consideration the whole court were of opinion, it was well enough, that being the legal import of the indorsement, and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser. *Judicium pro querente.*

The King *against* the Chancellor, Masters and Scholars of the University of Cambridge.

MANDAMUS to restore *Richard Bentley* to his academical degrees of batchelor of arts and batchelor and doctor of divinity.

Mandamus.
L. Raym.
1334.

To this they return, that the university of *Cambridge* is an ancient university, and a corporation by prescription, consisting of a chancellor, masters and scholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reasonable causes have used to deprive. That time out of mind there has been a court held before the chancellor or vice-chancellor for the determining of all civil causes where one of the parties was a member of the university. And that *Queen Elizabeth* by letters patent 26 April 3d year of her reign, granted them consueance of pleas, and to be a court of record, and several other clauses of the charter are set out, upon which no question arising, they may be omitted.

That 13 *Eliz.* this and all other charters of the university were confirmed by act of Parliament. That at a court held 23 *September* 1718. according to the usage of the university, before *Thomas Gooch*, D. D. the then vice-chancellor, one *Conyers Middleton*, D. D. a member of the university, levied a plaint in debt for 4 *l.* 6 *s.* against the said *Richard Bentley*, and prayed process against him. That thereupon according to the custom of the university a process issued to *Edward Clark* the beadle, to compel the said *Bentley* to appear at the next court. That before the return the beadle waited upon *Bentley* at his lodgings within the jurisdiction, and shewed him the process, and served him with it: and upon discourse between them concerning the process and the vice-chancellor, *Bentley* contemptuously said, the process was illegal and unstatutable, and that he would not obey it; that he took the process out of the hands of the beadle, saying the vice-chancellor was not his judge, *et quod praed' procancellarius stulte egit.* That at the next court held 3 *October* 1718. *Middleton* appeared, and declared in debt for 4 *l.* 6 *s.* and the register of the court exhibited a deposition of the beadle touching the contempt, which being read, the said *Richard Bentley* according to the usage of the university was suspended *ab omni gradu suscepto.* That time out of mind there has been a custom for the chancellor or vice-chancellor to summon a congregation, consisting of such and such particular members, who are specified in the return, who have used to examine and determine all matters relating to the university, and to take away degrees for contumacy or reasonable cause. That a congregation was held 17 *October* 1718. when the vice-chancellor declared this whole matter to them, and desired their judgment upon it, after which having read the deposition and the several acts of court, a certain grace was propounded, according to the usage of the university, in these words, *Cum reverendus vir Richardus Bentley collegii Trinitatis magister, ad summos in hac universitate titulos et honores vestro favore dudum promotus, adeo se immemorem et loci sui et vestrae auctoritatis dederit, ut debite summonitus ad comparandum et respondendum in causa coram procancellario, obedientiam recusaverit, ministrum universitatis summonentem indignis modis tractaverit, procancellarium et capita collegiorum opprobriis impetiverit, jurisdictionem denique universitatis longo usu, Regiis chartis, et auctoritate Parlamenti stabilitam, pro nihilo habendam esse declaraverit; cumque idem Richardus Bentley super his causis ab omni gradu suspensus fuit, et postea per tres dies juridicos expectatus, comparere tamen neglexerit; placeat vobis ut dictus Richardus Bentley ab omni gradu, titulo et jure in hac universitate dejiciatur et excludatur: et superinde per sententiam et considerationem dictae congregationis ab omni gradu, titulo et jure in eadem universitate dejectus et exclusus fuit.*

fuit. That he has not yet submitted himself to the authority of the university, *Et his de causis salva auctoritate academica*, they cannot restore him.

Cheshyre Serjeant pro Rege. The matter of the writ's issuing having been argued upon the rule to shew cause why there should not be a *mandamus*, I shall say nothing as to the writ itself; but taking it to have well issued, I shall proceed to consider, whether this return be sufficient to hinder the awarding a peremptory *mandamus*.

The return I take to be an insufficient return, and therefore a peremptory *mandamus* ought to go.

As this is not a case within the act of Parliament, it must be considered as a *mandamus* at common law, and the return must be certain to every intent.

That this writ is not brought for a small matter, I would just mention the consequence of the deprivation: there are many preferments and privileges which can only subsist in dignified clergymen, and some of them are mentioned in our statutes. 13 *Eliz. c. 12.* 17 *Car. 2. c. 3. §. 6.* So that now these degrees which at first were only titles of honour, (*Seld.* 326 to 333.) now affect men in their freeholds and possessions.

The defendants have shewn themselves to be a corporation by prescription, and as such they are under the controul of this court, and therefore they, as all other corporations, must shew the removal to be for a reasonable cause, and that the proceeding has been in a legal manner.

But this we say is neither a reasonable cause, nor a legal proceeding.

As to the reasonableness of the cause, I think the whole will come under these four heads, and if neither of them will warrant the suspension (for I am now upon that only) it will be admitted to be illegal. 1. The first is, that *Bentley* said, the process was illegal. 2. That he declared, the vice-chancellor was not his judge. 3. That he acted rashly, *stulte egit.* And, 4. The taking away the process.

As to the first, in saying the process was illegal, do not the parties every day say as much of your proceedings in *Westminster-hall*? Is any thing more common than for a man to tell the court, they have given judgment *erronice*, or have charged him *minus juste*?
You

You bear all this even where it is false in fact, and the judgment not erroneous; whereas in this case I am sure the return has verified what was said of the process, that it was illegal. For, 1. It doth not appear whether the officer was to compel the appearance, by an arrest of the body, or goods, or by distress infinite. 2. The plaintiff was in debt, and therefore it should have been a summons. 3. It is to appear at the next court, without saying when it was to be holden; which objection has been often allowed. 2 *Cro.* 314. *Cro. El.* 105. 1 *Mod.* 81. 1 *Vent.* 181. *Raym.* 204. 1 *Roll. Abr.* 484. 4. It is not said in the citation, at whose suit, or for what account, he was to appear. 6 *Co.* 54. These are all good objections to the process, and shew that *Bentley* was well justified in saying the process was illegal; though if it was legal, I know no harm in any man's disputing the legality of any process whatsoever.

2. He said the vice-chancellor was not his judge. But could his denying that weaken the power of the vice-chancellor over him, if he was his judge? In these cases they ought to have returned the occasion of speaking the words, which perhaps may very much alter the case.

3. He said the vice-chancellor *stulte egit*. What we are to understand by that expression, since they have not put an *anglice* to it, I cannot tell. It may signify that he has acted rashly, or unadvisedly, or something that is very innocent.

4. His taking the process. I do not find that he did any more than ask to see it, and so received it from the officer; it does not appear he did not give it him again, or that he took it out of the officer's hands without his consent.

But now if all this charge against *Bentley* was true, yet it will never warrant the suspension; admitting them to be improper expressions, yet for contemptuous words a man cannot be deprived. If he had said so in court, perhaps he might have been committed; and as they were out of court, he might be bound to his good behaviour; but removals for words can never be justified. 1 *Vent.* 302. 2 *Cro.* 586. 1 *Vent.* 327. 3 *Keb.* 709, 811. *Cro. El.* 78, 689. *Mo.* 247. *Latch* 299. *Noy* 92. *Palm.* 451. In *Baggs's* case he charged the mayor with acting foolishly (which is the most they can make of *stulte egit*;) but it was held, they could not remove him for it.

But admitting all this against me, that here was a reasonable cause of suspension, yet if there be not likewise a legal proceeding, the suspension will be void.

The first objection to the legality of the proceeding is, that the vice-chancellor had no sufficient evidence of the contempt; the register only exhibited *quasdam depositiones*, which doth not conclude them to be upon oath, for *depono* is a relative term, and must be applied.

But in the next place, if the word deposition should be thought to import the evidence to be upon oath, yet here is no authority to administer the oath set out in the return: the old books call such an oath *sacramentum fatuum*. 3 Inst. 167. Yelv. 72, 111. A master in Chancery must be averred to have power to administer an oath, or else the court takes no notice of it. Latch 39, 133. 2 Keb. 284.

Another imperfection in the proceeding is, that here was no notice given to *Bentley*, to come in and defend himself against the contempt; if he had been there, he might have so far explained himself, as to have taken off the force of the expressions: he might have told them, It is true, I did say the process was illegal, and have shewn them wherein: he might have shewn that the vice-chancellor was not his judge, but that he was visitable by some body else: and if you take *stulte egit* to signify no more, than that the vice-chancellor had acted rashly, it would have been easy enough for *Bentley* to have satisfied any body, but the vice-chancellor, of the truth of his assertion: and as to the charge about taking the process out of the hands of the officer, might not he have replied, though I took the process out of your hands, yet did not I give it you again, when I had looked upon it? All this would have been a very good defence, if they had given him an opportunity of making it.

But now to take it in the strongest manner, that he was utterly defenceless against every part of the charge, and that the charge will warrant his suspension; yet still there ought to have been notice: *quia quicumque aliquid statuerit, parte inaudita altera, aequum licet statuerit, haud aequus fuerit*. 11 Co. 99. 1 Sid. 14. 2 Sid. 97. Sti. 446, 453, 457, 478. I should not have cited these authorities to prove first principles, but only for the information of some who attend the argument of this cause.

The only matter which remains now to be considered is, what was done by the congregation in consequence of the vice-chancellor's suspension. If the suspension was illegal, what was done by the congregation will fall of course. If the suspension was legal, yet I shall insist the deprivation was not so.

The defendants themselves have shewn, that even this body is bounded by a restriction, to deprive only for reasonable cause. Now though the suspension, and the non-appearance for three court-days to submit himself (which by the way he was never called upon to do) will warrant a deprivation by the congregation; yet it is but reasonable that this accusation should be made out to them in a proper manner; and surely these gentlemen will never contend, that because Mr. Vice-chancellor *narravit* the contempt, and *petiit* the judgment of the congregation *de praemissis*, that this is sufficient to found the sentence upon. But they tell you, they inspected the acts of the court, and heard the depositions; perhaps there were no acts of court relating to this matter entered in the books; the expression is general, *inspectis actibus curiae*, without referring it to this case.

But further: If the suspension without notice could be got over, yet the deprivation never can. It was never imagined, that a member of a corporation, whose only privilege is perhaps to dine at the same table with Mr. Mayor, could be removed without a summons; and then *a fortiori* there ought to be one in this case, where the consequence will be the loss of several valuable preferments. It would be mispending your time, to cite cases to prove the necessity of a summons, and therefore I shall rest it upon the notoriety of the fact, which is every day's experience.

The defendants have founded their proceedings on custom, prescription, and act of Parliament, all subjects of the jurisdiction of this court; and if on the one hand they cannot restore him *salva auctoritate academica*, on the other hand this deprivation cannot consist with the preservation of all rights, liberties, and rules of law, which the members of the university are intitled to as *Englishmen*.

Comyns Serjeant contra. The nature of the proceeding at the suit of Dr. Middleton is no more than an outlawry or excommunication, to compel the appearance of the party: *Excerpta ex Statut. Oxon.* printed in 1674. tit. 21. *de judiciis*. The return amounts to shewing a jurisdiction to hold plea, an action properly instituted against Bentley, his contempt to the court, for which he was suspended, and afterwards upon his non-submission deprived.

It is very true what my brother *Chefhyre* has said, that degrees in universities were first introduced to encourage learning and learned men; but then it is no consequence, that if learned men behave themselves

themselves in a manner that does not become them, they may not be suspended or deprived.

To consider therefore the several parts of the return, I shall first endeavour to contradict what *Bentley* said to the officer, that the process was illegal. It appears the vice-chancellor had jurisdiction of the cause; it is averred to be agreeable to the course of the court, which answers the two first objections, that it should have distinguished how the officer was to compel the appearance, and that being in debt it ought to have been a summons.

The objection that the time when he was to appear is not mentioned, would overthrow all inferior jurisdictions that hold courts at no certain time, but only summon one when they have business, in which case the party must take care to inform himself as well as he can. The distinction is, where the courts are held at a certain day, and where not. *Dy.* 262. *2 Cro.* 214. *2 Bulf.* 36. *2 Cro.* 571. *Cro. Car.* 254. *1 Roll. Abr.* 484. *pl.* 22, 35. *Show.* 95.

It is said that it does not appear at whose suit, nor for what occasion he was cited. But upon the whole return it does appear, *taliter processum fuit*, that *Dr. Middleton* came in and declared for 4*l.* 6*s.* shews it to be a proceeding upon what was done before in issuing the process.

My brother is pleased to say, the whole behaviour does not amount to a contempt, and that any man may insist the process is illegal, and that he is not convened before his proper judge: and certainly so he may, but then it ought to be in the course of a legal proceeding. If *Bentley* had so far complied as to have appeared before the vice-chancellor, and have insisted on these several matters; though there should perhaps have been no ground for the objection, yet it would have been unreasonable in the vice-chancellor to have taken it as a contempt. But when nothing of this nature is done, when there is no appearance at all, but a great deal of matter insisted on without doors, in order to arraign the jurisdiction of the vice-chancellor, and the manner of the proceeding; it is certainly a behaviour which no man who is summoned to appear before a court of justice can justify. Is it fitting any man should tell a beadle, that he will not obey the vice-chancellor, and that he has acted foolishly? Or is the vice-chancellor to sit and hear all this, without shewing he has a power to punish such a contempt?

But then it is objected that though this be a contempt, yet the manner of the proceeding was not regular. In answer to which I would observe, that it is agreeable to the methods, both of the
common

common and civil law courts, to punish contemptuous words without calling in the party. If a man treats the process of this court with contempt, the way is to grant an absolute attachment, without giving him an opportunity to serve you so a second time.

As to the evidence of the contempt, it is averred to be according to the course of that court. A deposition is a matter related upon oath: the civil law says it may be done at the relation of the officer, that the court will so far give credit to their own officer, as to punish a contempt that he only relates to them.

The charge against *Bentley* for taking the process, does amount to an actual taking away; it is *de manibus abstulit*.

The case of disfranchisement of corporators has been insisted on, but surely that does not come up to this. There the right of the officer is finally concluded, whereas here is only a suspension till a submission: besides the members of a corporation have an interest in one another, but *Bentley's* case has no relation to any body else.

The method of the whole proceeding, both as to the suspension, and what was done by the congregation, may be right, though it does not tally with the method of our common law proceedings. A *feme covert* may sue in the spiritual court without her husband, and if in a motion for a prohibition cases should be cited to prove the necessity of the husband's joining in a suit, yet we should be told at last, that it was the method of their proceedings below, and was well enough: does not our admiralty court enforce the sentence of a foreign court, without examining into their method of proceeding?

I would not have it gone away with as a notion, that the university of *Cambridge* affect an uncontrollable jurisdiction. They only desire to enjoy their privileges in a manner consistent with law and justice: they insist, that what they have done in this case is so, and therefore they hope there shall be no peremptory *mandamus*.

C. J. This is a case of great consequence, not only as to the gentleman who is deprived, but likewise as it will affect all the members of the university in general.

I think the return has fully justified us in sending the *mandamus*, as it shews the power of the vice-chancellor and the congregation is only to deprive for a reasonable cause; and as it is not pretended there is any visitor, or any other jurisdiction, to examine into the reasonableness of the deprivation, but that of this court.

It is the glory and happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment: and lest in this particular case the party should be remediless, it was become absolutely necessary for this court to require the university to lay the state of their proceedings before us; that if they have erred, the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed.

The university ought not to think it any diminution of their honour, that their proceedings are examinable in a superior court. I am sure this court, which is superior to the university, thinks it none; for my own part I can say, it is a consideration of great comfort to me, that if I do err my judgment is not conclusive to the party, but my mistake will be rectified, and so injustice not be done.

As to the proceeding against Dr. *Bentley*, it must be agreed that the vice-chancellor had consueance of the cause, and so the suit was well instituted against him. I must likewise take the process to compel an appearance to be regular, being averred to be according to the course of that court.

As to Dr. *Bentley's* behaviour upon being served with the process, I must say it was very indecent, and I can tell him if he had said as much of our process we would have laid him by the heels for it: he is not to arraign the justice of the proceedings out of court before an officer, who has no power to examine it.

When he said the vice-chancellor *stulte egit*, it was what he might have been bound over for to his good behaviour; but I believe it is also established, that such a behaviour will not warrant a suspension or deprivation.

He said he would not obey, but *non constat* but he thought better of it afterwards, and did appear.

I cannot think the evidence of this contempt was sufficient: it does not appear to have been upon oath, as it should have been.

But be these matters how they will, yet surely he could never be deprived without notice. I do not observe but it is a total deprivation, and not temporary only, as was said at the bar.

As to the proceedings before the congregation, it does not appear they reheard the matter any otherwise than by the relation of the vice-chancellor. They should have adjudged all the facts again, and have averred, that the deprivation was for them; whereas *his de causis* they deprived him, amounts to no more than that the vice-chancellor told them so.

The vice-chancellor's authority ought to be supported for the sake of keeping peace within the university; but then he must act according to law, which I do not think he has done in this case.

Powys J. accord' in omnibus.

Eyre J. The university, unless they had a visitor, are certainly accountable to this court. As to the deprivation, I am not satisfied, that for a contempt to the vice-chancellor's court, the congregation which is another court can deprive; for it is not a contempt to the university in general, and it is not said in the return, that for contempts to the vice-chancellor the congregation can deprive. Every court has a power to punish contempts to itself, but I never till now heard of one court's resenting a contempt to another.

But surely for a contempt they cannot deprive. We punish our officers, but we do not turn them out. Or if they could deprive, it can never be done without notice.

Though the vice-chancellor had jurisdiction in this matter, yet in virtue of our superintendency over all inferior jurisdictions, we must take care he does not abuse his authority. Do not we prohibit the spiritual court, till they give a copy of the libel, in all cases within their jurisdiction?

Fortescue J. If they had returned a visitor, it would be something, but without that they must submit to the jurisdiction of this court, which is no more than exempt jurisdictions, as the county palatine which has *jura regalia*, do.

A deprivation can never be the proper punishment for a contempt, because it cannot hold in the case of under graduates. I think the behaviour of Dr. Bentley was a contempt, for which he might be bound to his good behaviour, as it was out of court.

There is another thing considerable in this case, whether upon any account the university can deprive a man of his degrees; because he is in from the crown, whence the power originally flows.

Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon *Adam*, before he was called upon to make his defence, *Adam* (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to *Eve* also. *Per cur'*, *ulterius concilium*.

Hil. 10 Geo. it was argued a second time by Mr. *Reeve* for the writ, and Mr. Attorney General *e contra*. And without entering much into the debate of the other matters, the court held the whole proceeding to be illegal for want of a summons, and so granted a peremptory *mandamus*.

Between the Parishes of *Foston* and *Carlton*.

TWO justices send a poor person from *Foston* to *Carlton*. On appeal the order is quashed, and at three months end two justices, without shewing any new settlement since the last order, make a new order to remove him from *F.* to *C.* a second time. *Et per curiam*, The last order must be quashed. The case of *Barrow v. Ingoldby*, *Pas. 11 Ann.* was at the distance of nine months, but the court quashed it, because there could be no inconvenience in putting them to shew a new settlement.

On After an order of removal is quashed, the party cannot be removed a second time without stating a new settlement.

Dominus Rex vers. Unitt.

THE court declared that a declaration in ejectment was so far a process of the court, that they would punish contemptuous words on the delivery of it, as a contempt of this court.

Ejectment is a process of the court. *Salk. 260.*

Dominus Rex vers. Burchett.

THE court ordered an attachment *nisi* against the town clerk of *Guilford*, and a defendant convicted on the game act, for granting and suing out a replevin of goods distrained for the penalty. But on shewing cause the next term, when *Eyre J.* only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case *B. R.* never interposes.

Contempt.

Dale

Dale *vers.* Johnson.

At nisi prius in Middlesex coram Pratt C. J.

Evidence.

THE defendant in the action assigned for error, that the plaintiff died before judgment; and to prove it he called the wife of the plaintiff, and the Chief Justice allowed her to be a witness. *Quaere tamen*, for that is begging the question, which was then to be tried.

Mountcan *vers.* Wilson. Ibid.

Coram Eyre and Fortescue *Justices.*

All acts done by commissioners must be signed during their sitting.
Dav. 42.

A Certificate from the commissioners for stating the debts of the army was offered in evidence, but rejected, because it appeared to be signed by one at a time at their houses, the Judges being of opinion that it could only be signed sitting upon the commission, like the dean and chapter of *Fernes's* case of *capitulariter congregati*.

Rushdell *vers.* Carnesse. In Canc.

Where there is a legacy to the executor for his trouble, the surplus shall be distributed.

JUSTICE Powys (who sat for Lord Chancellor) delivered a special resolution on this case.

A woman makes her will, and amongst several small legacies she says, And to *A. B.* my executor 5*l.* for his care in fulfilling my will.

¹ Vern. 473.
² Vern. 673,
675, 736.

This has long been a litigated question, whether the executor should have the surplus, where there is a specifick legacy to him. The case of *Forster v. Monk* before Lord *Jefferies* was soon after the statute of distributions, and he held that the surplus should be distributed. The three commissioners of the great seal afterwards reversed this decree, but upon appeal to the House of Lords the reversal was reversed, and the decree for a distribution set up again.

² Will. Rep.
114.]

The next was the Duchess of *Beaufort's* case, where the use of the plate was given her for life, and Lord *Cowper* decreed a distribution; but the Lords reversed it, because it was only a possession of it that was given her, and no property.

Then came the case of *Littlebury v. Buckley*, which was in the ^{2 Vern. 677.} equity court of *London* before Sir *Peter King* the Recorder, who decreed a distribution where the devise to the executor was of all his effects beyond sea. But there being in that case a strong evidence of a contrary intent, the Lords allowed themselves a latitude of examining such proof, and thereupon reversed that decree.

The last case I shall mention was that of *May v. Lewen* in this court in *February* 1720, before the present Chancellor, where there was a devise to two executors of 50 *l.* a-piece for their trouble and pains; and a distribution was decreed.

This case is the very same with the case at bar. The giving a legacy for his care, shews plainly the testator intended him only as a trustee, and therefore I found myself upon those words, in decreeing a distribution in this case.

N. B. This being *vexata quaestio*, in 1725 *King*, then Lord Chancellor, brought a bill into the House of Peers (which passed that House) to settle the point; but upon sending it down to the Commons it was thrown out upon the first reading; a bill sent up by the Commons to prevent bribery and corruption in elections having been refused to pass in the House of Lords. The bill was to have settled it for the benefit of the executor.

Lock *vers.* Wright.

Hill. 7 Geo. rot. 353.

THE plaintiff declares, that the defendant by his writing intended agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500 *l.* fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same 950 *l.* on the 5th of *November* next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

Where there are mutual remedies, either may sue without shewing a performance on his part. Difference between an indenture and deed poll.

The defendant demurs generally, and Mr. *Lingard pro defendente* objected, that the plaintiff had not shewn the delivery of any receipts, or an impossibility of doing it, and cited 1 *Lutw.* 245. *Salk.* 171.

Probyn contra answered, That there were mutual remedies, and therefore it need not be shewn. 1 *Saund.* 319. 1 *Lev.* 274.

Eyre Justice doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept; to which *Fortescue* Justice inclined. *Sed per Pratt* Chief Justice, The time for payment of the money is certain at all events; but as for the delivery of the receipts, that was left uncertain, because it was impossible to fix a time for that; and if the defendant has made a foolish bargain in undertaking to pay the money on the 6th of *November*, whether he had the receipts or not, we cannot help him. The nature of these contracts is for the other party to give a deed obliging himself to deliver the stock; but even upon this agreement I should think the defendant would have his remedy. In the case of a deed poll, if the lessee enters and enjoys the land, the other shall maintain debt for rent, and yet the whole is the words of the lessor.

Pasch. 8 *Geo.* it was argued a second time by *West pro defendente*. It will not be disputed but that generally speaking the word *pro* will create a condition precedent. 1 *Vent.* 147. 2 *Mod.* 33. 1 *Lev.* 87. *Salk.* 112. And that it will do so in this case, if I can clear it from two objections that have been made. 1. That here is a mutual remedy; and, 2. That here is a particular day fixed for the payment of the money.

As to the first; That is begging the question, for I take it there is not a mutual remedy, the words being the words of the defendant only, "That he will accept the subscription, and pay for the same:" which lays the plaintiff under no obligation to deliver the receipts. 1 *Saund.* 320.

2. As to the second objection, that here is a particular day appointed for payment of the money; I do admit, that if it appeared upon the contract, that such a day must of necessity happen before the receipts could be delivered, it would then be very difficult to answer it; but that is not this case, for the company might if they pleased have given out the receipts; and that brings the case within the distinction laid down by Lord Chief Justice *Holt* in the case of *Thorpe v. Thorpe*, *Salk.* 171. Besides, it is observable, that this is an entire covenant, to accept and pay, so that he is not to pay till he can accept. *Lutw.* 490.

Reeve contra. I admit the first part of Mr. *West's* argument, but insist on the two objections he has taken notice of, as sufficient to bring this case out of the reach of that general doctrine.

Here is a certain sum to be paid at a certain day, and that too before the other part of the contract could possibly be performed. The court will take notice of the *South-Sea* acts, and by that of 7 Geo. 2. it appears the receipts could not be delivered by the 6th of November; so that this case falls within the first distinction of *Thorpe v. Thorpe*, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money, before the thing be done; because it appears the party relied upon his remedy.

But then say they, here is no mutual remedy. But I take it, that this being an agreement by indenture, the court will intend it was executed by both parties. As to the cases they are all of parol agreements, where a consideration must appear to make it a binding promise; but here the action will be maintainable on the bare covenant to pay, without any consideration at all, and therefore the *pro*, &c. may be left out.

Adjournatur. And this term *Pratt* Chief Justice delivered the resolution of the court.

This is an action upon a deed poll made by the defendant, and whereby he covenants to accept so much stock, and to pay for the same, and the plaintiff in an action for the money has not averred a delivery or tender of the stock, and for this fault we are all of opinion, the declaration is not good.

The intent of the parties appears to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed poll of the defendant only; and therefore though upon delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant on the other side upon payment of the money will have no remedy to compel the delivery of the stock; and having no such remedy he shall not be obliged to pay the money, till the consideration for which it is payable is performed.

The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties: in this case it must be

a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect, and this is proved by 7 Co. 10. and 1 Inst. 204. where the annuity *pro una acra*, says the book, supposes the acre to be first granted.

The case of *Callonel v. Brigs*, (Salk. 112.) was not so strong, for there was a promise to transfer, which gave a mutual remedy; but yet *Holt* Chief Justice held the plaintiff to shew a tender, because that was the consideration for the defendant's payment of the money. And the case he there puts of the sale of a horse for 10*l*. is exactly the same with this.

The resolutions that were mentioned at the bar of the case of *Thorpe v. Thorpe*, are all founded on great reason, and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed poll is likewise taken and allowed in the case of *Pordage v. Cole*, 1 Saund. 320. where the court were of opinion the defendant had his remedy, "otherwise (says the book) it would have been, if the deed " had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

Michaelmas

Michaelmas Term

10 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Paine vers. Masters.

ACTION *sur le case* upon a promissory note, the defendant pleads the delivery of twenty hogsheds of claret in satisfaction, and which *ipse praed'* the defendant (instead of the plaintiff) received in satisfaction. On a general demurrer *Strange pro quer'* objected, that the averring the delivery of the wine to the plaintiff was not sufficient without shewing his acceptance of it, which was wanting in this case by the defendant's name being put instead of the plaintiff's. And cited *Salk. 629.* and the case of *Hawkshaw v. Rawlings in B. R. Hil. 3 Geo.* in both which the court held, that the bare pleading he gave the thing in satisfaction, without shewing that the plaintiff received and accepted it, as such, would be insufficient. *Et per curiam*, Judgment for the plaintiff. *Ante 23.*

Pleading the delivery of any thing in satisfaction is not sufficient without shewing an acceptance.

Robinson *vers.* Green.

Non assumpsit
a good plea
to an action
against a car-
rier.

THE plaintiff declares against a carrier upon the custom of the realm, and sets forth, *quod ipse* (the plaintiff) *requirebat* the defendant *ad carriand' bona praed'* from the parish of St. Sepulchre's to Uttoxeter, *dictusque* the defendant *adtunc et ibidem bona praed' ad carriand' recepit*, and afterwards lost them.

The defendant pleaded *non assumpsit*, and after verdict for the plaintiff it was moved in arrest of judgment, that this action is founded upon the tort in not delivering the goods, and therefore the proper plea would have been Not guilty.

E contra it was insisted, that though it is a tort, yet it arises from an agreement, and any general issue will be good, that will bring the merits of the cause in question. As Not guilty in *assumpsit*. *Cro. El.* 470. *1 Lev.* 142. *Sir T. Jones* 184. And it will certainly be aided after a verdict. *1 Sid.* 340. *1 Saund.* 103. *Sir W. Jones* 140. *Cro. Car.* 78.

Et per curiam, It is well enough, the undertaking to carry is the *git* of the action, and as in *assumpsit* you may plead Not guilty, as was done in the case of *Cogs v. Bernard*, *Salk.* 26. as appears by the record at the end of the book, page 733. So in the case of a tort founded on an agreement *non assumpsit* will be sufficient, because it tries the merits, as much as Not guilty could have done. The plaintiff had judgment.

Davies *vers.* Hoyle.

Where a *nolle prosequi* is entered, the plaintiff need not be amerced.

ON error *e C. B.* in an action upon the case on several promises, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle prosequi* as to the rest, and the defendant is put without day.

It was objected, that this is a confession, that the plaintiff had no cause of action as to those counts, and therefore he should be amerced *pro falso clamore*. But *Eyre J. (solus)* thought it agreeable to all the entries, and so the judgment was affirmed.

Ball *vers.* Bostock. At Guildhall.

IN trover for three *South-sea* bonds the case was this. *Ball* delivered to *Lechmere* a broker these bonds to sell, and they were picked out of his pocket. Notice being given at the *South-sea* house they were stopt by Mr. *Henry* one of the clerks, upon *Bostock's* bringing them to receive the interest. Upon this *Bostock* brought trover against *Henry*, who at the trial offered to prove the property to be in *Ball*, and called *Lechmere* for that purpose. But it appearing he had given bond to indemnify the company in stopping the bonds, *King C. J.* refused to let him be examined, saying that though there are many instances where a party shall be a witness, though he is concerned in the event of the cause; yet there never was a case of allowing one who had made himself liable to pay costs in the action; upon this the plaintiff recovered. Then *Ball* brings trover against *Bostock*, and at this trial exception was taken to *Lechmere's* evidence, because if *Ball* should recover against *Bostock*, that would be set in equity against the former recovery by *Bostock* against *Henry*, and so discharge *Lechmere's* bond: but the Chief Justice said, that was too remote to exclude him from being a witness, and went only to his credit. Whereupon he was sworn, and proved the property in *Ball*, and that they were stolen. On the other hand the defendant proved that he bought them at a tavern of a clergyman, and paid 300*l.* in money besides the interest: the Chief Justice left it to the jury upon the validity of the sale, and they found for the defendant.

Where a person may be interested and yet shall be a witness.

Douglass *vers.* —

UPON an affidavit that they had tendered a declaration in Practice. Ejectment, and that the servants refused to call their master, or receive it, saying they had orders to take no papers, *Wearg* moved, that leaving it at the house might be sufficient, which was ordered accordingly.

Taylor *vers.* Lake.

IT was moved to set aside a verdict, because the *distringas*, when Stamp duties, it was at *nisi prius*, was not stamped: but the plaintiff now producing it stamped, the court would do nothing in it, since the penalty must have been paid, and then it is as good as if stamped at first. 9 & 10 *W. 3. c. 25. § 59.*

Tarrant

Tarrant *vers.* Mawr. In C. B.

Husband cannot stop the wife's proceedings in spiritual court for defamation.

THE wife libelled in the spiritual court for calling her whore, and there being proceedings likewise for defamation against her by the other, the two husbands enter into an agreement to stay proceedings on both sides; and upon one of the wives going on, the husband moved for a prohibition; but denied, for *per curiam*, the suit is by the wife, to recover her fame, and it is not in the power of the husband to restrain her. 1 *Roll. Rep.* 426.

Johnson *vers.* Lancaster.

Tender pleadable to a quantum meruit.

IT was settled on demurrer, that a tender is pleadable to a quantum meruit, and said to have been so held before in *B. R.* 10 *W.* 3. *Giles v. Hart*, *Salk.* 622.

Palmer *vers.* Episcopum Exon.

No ornaments can be set up in the church without consent of the ordinary.

SIR Thomas Bury set up his arms in the church of *St. David's* in *Exon*: the ordinary promotes a suit in the spiritual court, to deface them, as being set up without his consent. Mr. *Cruweys* moved for a prohibition on the authorities that action lies by the heir for defacing the monument of his ancestor; but *Eyre* and *Fortescue* Justices said, the ordinary was judge what ornaments were proper, and might order them to be defaced.

Serjeant *Glyde* moved it in *C. B.* and it was denied there also.

Richardson *vers.* Atkinson.

At nisi prius in Middlesex coram Eyre et Fortescue (absente C. J.)

Taking part and spoiling the rest is a conversion of the whole.

THEY held that the drawing out part of a vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole.

Beck *vers.* Nichols. In C. B.

TRESPASS of assault, battery, wounding and imprisonment, ^{Where no more costs than damages.} and also for breaking and entering his house, and opening the doors of the said house, and breaking the locks and three bars belonging to the said doors; the defendant pleaded Not guilty to all except the imprisonment, which he justifies; on trial the justification was found for the defendant, and the Not guilty for the plaintiff. Damages 2 s. 6 d. And held by the court that the damages being under 40 s. he could not have full costs for the battery, because the Judge had not certified the battery to be proved, neither could he have full costs for breaking the house, &c. because this was a trespass relating to the freehold, the construction of the 22 & 23 Car. 2. c. 9. § 136. having been, that it extends to trespasses relating to the freehold and inheritance, and to such trespasses only; which is collected from the exception where the Judge certifies that the title came in question, which shews that the act extends only to such trespasses, where the freehold might come in question, and not to trespasses of chattels.

Hilary Term

10 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } Justices.
Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Dominus Rex *vers.* Major' de Kingston super Hull.

Cannot join
distinct rights
in one manda-
mus.

Salk. 433,
436.

A Motion was made for a *mandamus* to the mayor, to assemble and do the business of the corporation, and the writ was granted accordingly. In drawing up the writ they made it out for an assembly, and to admit all persons having a right to their freedom, who should appear before them and demand it. Serjeant *Pengelly* moved to supersede it, because every person's was a distinct right, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam*, It must be superseded, for we never intended such a complicated *mandamus* as this.

Dominus

Dominus Rex vers. Inhabitantes de Cirencester.

IT was stated, that an apprentice was bound in the parish of *A.* and lived there off and on for three quarters of a year. Exception was taken, that this was no settlement, since he might not inhabit forty days together. *Sed per curiam*, That is not necessary, and the order for making it a settlement was confirmed.

The forty days inhabitation of an apprentice need not be all together.

Dominus Rex vers. Johnson.

A Female child of nine years old was brought up by *habeas corpus* in the custody of her nurse. And it was moved that she might be discharged, if she was under any restraint, which was agreed to, but it appeared she was not. Then it was moved, upon producing her father's will devising the custody of her to an uncle, that she might be delivered up to him as her guardian. The court at first doubted whether they should go any further than to see she was under no illegal restraint, and took time till the next day to look into Mrs. *Turberville's* case, *ante* 444. And then declaring, that this being the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian, who took possession of her in court.

Child brought up by *habeas corpus* delivered to guardian. L. Raym. 1334.

Bullock vers. Noke.

At Guildhall coram Pratt C. J.

IN a stock cause the plaintiff proved a tender on the second day of the opening, and would have examined into the custom of the alley, which was to allow either party a day or two to tender or accept; but the Chief Justice refused to hear us, saying their usage could never alter the law, and so the plaintiff was called. *N. B.* In *C. B.* Chief Justice *King* left it to the jury upon such an evidence, and they found it a good tender.

Tender of stock must be on the very day.

Between

Between the Parishes of St. Giles in Reading and Eversley
Blackwater in Berks.

Q. Where
children born
at the resi-
dence of the
father for four
years, in a
place where
he was not
settled, are
settled after
his death.

L. Raym.
1332.

UPON a special order it was stated, that *William Chesterman* was born in *St. Giles's*, and put apprentice in *Eversley Blackwater*, where he served two years, till the master failed; that then he returned to *St. Giles's*, where he lived four years, married a wife by whom he had there two children, and died; and that during the last four years he never lived in *Eversley Blackwater*.

Upon this order the question was, where the wife and children were settled. As to the wife, all agreed her to follow the last settlement of her husband, which was in *Eversley Blackwater*; but as to the children the court were divided, the Chief Justice and *Powys J.* inclining, that they having never been removed during the life of the father, they were settled in *St. Giles's*, the place of their birth. But *Eyre* and *Fortescue* Justices, thought the settlement to be in *Eversley Blackwater*, and that since during the life of the father they might have been sent thither, his death would not vary the case.

Children born
where the
father is not
settled may
be sent to his
settlement af-
ter his death.

Adjournatur; and this term it was debated again, and the Chief Justice changed his opinion, holding now that the settlement of the children was in *Eversley Blackwater*, and that the death of the father would not hinder their being sent thither; *Powys J.* likewise came over, so that there were three of that opinion against *Raymond J.* who thought that this case must often have happened, if children could be thus sent after the death of the father. They said the case of settling bastards and vagrants at the place of their birth was *ex necessitate*, but here was none.

The order for sending the children to *Eversley Blackwater* was confirmed.

Easter

Easter Term

10 Georgii Regis. In B. R.

Sir John Pratt, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*

Sir John Fortescue Aland, *Knt.* } *Justices.*

Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Knight *vers.* Cambridge.

Idem *vers.* Dodd.

Hil. 9 Geo. rot. 375.

ACTION *sur le casé* upon a policy of insurance, whereby the insurer undertakes against the *Barratry* of the master and mariners; and assigns the breach in a loss *per fraudem et negligentiam* of the master. Judgment *pro quer'* in C. B. and the general errors assigned. *Barratry* in a policy, the signification thereof. L. Raym. 1349.

It was objected in this court, that the *fraud* and *negligence* of the master was not within the policy, being more general than the word *barratry*. *Et per curiam*, The negligence certainly is not, but the fraud is. *Barratry* is of a general signification, and not confined barely to the running away with the ship. It comes from *barat*, which signifies *fraus* and *dolus*, and extends to any fraud of the master. The end of insuring is to be safe in all events, and it would

be very prejudicial, if we were to be making loop-holes to get out of these policies. The insurer knows the master, and whether he can trust him; and he that insures against his running away with the ship, never imagined he might or would be guilty of any other fraud. Judgment affirmed.

Between the Parishes of Puckington and Chepton Beencham in com' Somerset.

The bankruptcy of the master does not dissolve the apprenticeship.

L. Raym. 1352.

UPON a special order the case was stated, that *A.* was bound an apprentice, and served and inhabited two years, till a commission of bankruptcy was taken out against the master, at which time the apprentice without having the indenture delivered up, or any discharge at the sessions, hires himself as a common servant into another parish, and served a year. The sessions adjudge this to be no dissolution of the apprenticeship, and consequently, that the settlement of the apprentice was in the first parish where he was bound.

Et per curiam, Their judgment is right. There could be no dissolution of the contract, unless the indenture had been delivered up, or the sessions had discharged him; as no doubt they would have done, if they had been applied to. And then as the first contract had continuance, the apprentice had no power to hire himself; and the service afterwards for a year was void, as to any pretence of giving him a settlement. That service must be taken as a service to the first master, who by law was intitled to the wages, and therefore the order must be confirmed.

See Co. Litt. 117. a.

Case of the Mayor of Penryn.

There must be judgment of ouster where the party is found duly elected but not sworn.

This judgment was affirmed in Parliament.

ON an information *in natura de quo warranto*, to shew by what authority he exercised the office of mayor, there were two issues, the first as to his election, which was found with the defendant, and the second as to the swearing, which was found against him. Upon return of the *posse*, it was moved, that judgment of ouster should not be against him, seeing he was duly elected, but that he should rather have a *mandamus* to swear him in. *Sed per curiam*, The acting without being sworn is certainly an usurpation, and that being found, we must pronounce judgment against him upon this record. If he be not too late, he may have a *mandamus* to swear him in, but we must punish him for his usurpation hitherto. Judgment *pro rege*. 9 Ann. c. 20.

Ruffel *vers.* Martin.Idem *vers.* Thorpe.

IN debt upon a bail bond the *memorandum* was of *Trinity* term, and I excepted, that the assignment appeared to be in *November* following. Then the plaintiff moved to amend, and I objected, there was nothing to amend by. *Et per curiam*, We cannot amend it, as it now stands; but we will give leave to file a new bill of *Michaelmas* term, with a special *memorandum*; which the plaintiff afterwards did, and then amended of course upon payment of costs.

The court will give leave to file a new bill to amend by.

Dominus Rex *vers.* Gunston.

SERJEANT *Darnall* moved for a *certiorari* to the *Old Bailey*, to remove an indictment against a person of credit, for falsely pretending that a person of no reputation was Sir *John Thornycraft*, *per quod* the prosecutor was induced to trust him. *Sed per curiam*, As you move on behalf of the defendant, we must have a more particular reason; *ideo nil capiatur per motionem*.

No *certiorari* to *Old Bailey* without special cause.

Stevenson *vers.* Nevinson.

On a trial at bar in B. R.

THE question was, whether the plaintiff was qualified to be elected common council-man of *Apulby*. The defendant attempted to disqualify him, by setting up two qualifications which he had not, *viz.* a burgage tenure, and being an inhabitant; and to prove this called one who was an inhabitant, but had not a burgage tenure. It was objected, that he was no witness to narrow the right, and confine it to burgage tenants and inhabitants, having one of the qualifications himself, and therefore so far interested, as he was nearer the right he set up than other persons; but the court said there was a necessity of allowing such people in a question of this nature, since they must best know the right; besides he was in effect a witness against himself, by saying, though I am an inhabitant, yet I have no right to be chosen, because I have not a burgage tenure.

Where there are two qualifications to an election of an officer, he who has but one only may be a witness as to the right.
L. Raym.
1353.

Anonymous.

Anonymous.

On a trial at bar in C. B.

Where the power is only to revoke, no new uses can be declared.

A. Suffers a recovery to the use of himself for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and seal. He revokes them within the terms of the power, and by the same deed declares new uses in favour of the plaintiff, without any words of conveyance, covenant to stand seised, or consideration expressed: and upon this the question was, whether this new declaration of uses was good or not.

It was insisted on *pro quer'*, That *A.* having revoked the intermediate remainders, had the whole fee in himself, and might dispose of it as he pleased; and whether it was by the same deed or by a different deed was not material.

But it was answered and resolved by the court, That true it was he might by will or any new conveyance have made such new disposition, and even the same deed would have been sufficient for that purpose, if there had been a new grant, or a new covenant on consideration expressed; but here he had declared new uses as under the recovery, whereas the uses of the recovery were full before, and the power was only to revoke, and not to limit new uses. *Ex relatione aliorum.* The plaintiff was nonsuit.

Sir Christopher Musgrave *vers.* Nevinston.

New trial granted after a trial at bar. L. Raym. 1358.

THE corporation were all invited to a treat, when one of the aldermen desired leave to resign, upon which his resignation was taken, and the plaintiff at the same time chosen and sworn in. Upon a trial at bar the jury found it a good election; and the court granted a new trial, it being fraudulent, and it appearing one of the members was not there till after the election, and there was no summons to meet to do such a corporate act, that the members might come prepared. The meeting likewise was not in the *Moot-hall* but at a tavern, and it was a plain surprize, and even all not present.

As to the point of its being a trial at bar the court made no difficulty of that, since the case of *Bewdley*, and another of Sir Joseph Tyley

Tyley v. Roberts in C. B. where on a trial at bar whether *compos* or *non compos* the jury found against the weight of the evidence, and there was a new trial. The case in *Stiles* (which is the first new trial in print) was after a trial at bar; and in the case of an alderman of *Derby* he was afterwards ousted upon a *quo warranto*.

Et per Raymond Justice. My Lord Chief Justice *Holt* used to say, he was of opinion that the practice of granting new trials was much ancients than the case in *Stiles*; since we meet with challenges that the party was sworn on the former trial, and therefore ought not to be a juror again.

N. B. As to another of the corporators of *Apulby*, he was put to prove the receiving the sacrament within a year before his election, it being recent, and therefore the court required it, though no notice was given him for that purpose.

A corporator on a recent prosecution must prove receiving the sacrament within a year.

Wilkinson *vers.* Myer.

Ld. Raym.
1350.

IN an action of covenant on a *South-Sea* contract the defendant pleaded, that the contract was never duly registred according to the late act of Parliament; and upon the trial of that issue a case was made for the opinion of the court.

What is a good registry of a *South-Sea* contract.

That the contract was by indenture (set out *in haec verba*) whereby the plaintiff in consideration of 1436 *l.* 10 *s.* to be paid by the defendant, doth covenant to transfer to him all such stock, bonds and money, as the *South-Sea* company shall allow on the account of 1277 *l.* 1 *s.* 6 *d.* lottery annuities then lately subscribed into the stock by and in the name of the plaintiff: in consideration of which the defendant covenants to accept the produce of such annuities, and to pay for the same 1436 *l.* 10 *s.* at the same time: that this contract was entered in the books of the *South-Sea* company *in haec verba*, under which the plaintiff subscribed these words, *This is for my proper use and benefit*; and then signed his name *Philip Wilkinson*.

That no evidence was offered that the contract was made for the use and benefit of any person besides the plaintiff, nor that the contract was made for the use and benefit of the plaintiff only.

And a verdict was given for the plaintiff, subject to the opinion of the court upon this case.

Strange pro quer. The question is, whether this contract be duly registred, according to the direction of the late act of Parliament. I shall offer my reasons in support of this registry; and since this is like to be a leading case, and that many thousands of contracts are to stand or fall by the event of this question, I shall state the clause at large, because I apprehend it will be material.

The act of Parliament upon which this question arises is the only act that passed in a session held for that purpose at the latter end of the seventh year of his Majesty's reign; and after some other provisions for restoring the publick credit, which then greatly suffered by the mismanagement of the *South-Sea* directors, it comes to the case of contracts between private persons, and takes notice of the necessity there was, to make some regulations or orders touching contracts for the sale or purchase of subscription or stock, for preventing a multiplicity of vexatious and doubtful suits in law or equity concerning the same, and therefore it enacts, "That every
 " contract for the sale or purchase of subscriptions or stock, which
 " shall be unperformed and not compounded before such a time,
 " or an abstract or memorial thereof, signed by the party interested
 " therein, and who shall be minded to take advantage of the same,
 " shall be entered and registred in books, which the respective
 " companies are required to prepare for that purpose: and in de-
 " fault of such entry or register every such contract, as to so
 " much as shall remain unperformed or not compounded, shall
 " be void." And then it follows, "That such entries shall express
 " the names of the parties or persons for whose use or benefit
 " such contracts were made."

Having stated the clause, I shall consider what was the intention of this act of Parliament, and whether our registry has fulfilled that intention. The intention of the legislature is expressed in that part of the clause which is introductive to the enacting part; it was to prevent a multiplicity of vexatious and doubtful suits in law or equity, by giving the buyer of stock a view, as well of him who has the legal remedy, as he who has the equitable interest, thereby to ease him of the trouble and expence of a suit in equity against the visible contractor, to discover whether the sale was not secretly in trust for another, against whom perhaps the buyer might have an equitable bar; and therefore if it is disclosed in the registry, not only where the legal remedy lies, but also who has the equitable interest, there is an end of any trouble from vexatious and doubtful suits in law or equity about that matter, which was all that was proposed or designed by the legislature.

In the case at bar, the contract is registred *in haec verba*, and by that it appears the now plaintiff has a legal remedy (such an one as he has pursued) by action of covenant against the defendant. But say they on the other side, that is not enough, he may only be nominal in this affair. In answer to that, he has added these words that are stated in the case, *This is for my proper use and benefit, Philip Wilkinson*. So that he has answered the intent of the act in both respects; he has registred the deed, which gives him the title at law, and he has likewise shewn the equitable interest to be in himself.

To this it is objected, that by the words of the act he is required to express for whose use or benefit the contract *was made*; and that in the present case, it is only expressed for whose benefit the contract was at the time of registering.

I would submit two things as an answer to that objection.
1. That this is a forced construction, and carries the words *were made* farther than is necessary to answer the design of the act. And,
2. That if your Lordship should be of opinion to construe it so nicely, yet our registry will be sufficient.

1. To shew this to be a forced construction, and what there is no occasion to make, in order to attain the end of the legislature, I would beg leave to say, that considering, this act is made to restrain men in some degree from the full exercise of a legal remedy they had before; it is to be construed in such a manner, as will deprive the subject of as little as may be, and it is not to be extended to any construction beyond what will strictly answer the view of the Parliament; and so the court did often intimate upon several motions that have been in this court relating to bail upon this act of Parliament, where they kept strictly to the words of the act, without extending them to similar cases.

The expression in the act is indeed in the preterperfect tense, *were made*; but I shall submit it, whether considering how that expression comes to be made use of, it ought to be expounded strictly to mean the time of making the contract.

The legislature are speaking of contracts then in being, and therefore it was natural to speak of them as contracts that *were made*; and in this view the expression will be far short of what it would have been, if the act had required the entry to express the names of the parties for whose benefit the contracts were at the time of making; and it may be material to observe, that in another

part of the act that phrase is used, where they are providing for the case of a contract, when the seller had not the stock at the time of the contract: now if it had been intended to have gone so far back in our case, what reason is there why the same expression was not made use of? The act of Parliament was never intended as a snare, to avoid all contracts that were not registered according to the strictest letter of the law. The only general view (besides what related to particular persons) was to see a little into the number and extensiveness of the contracts, in order to apply farther remedies if there was occasion.

In a common law conveyance the word *procreatis* (which strictly speaking signifies children that *were* born at the time of the feoffment) has nevertheless been construed to take in all the issue, whether born before the feoffment or after; and yet that is an expression as strongly respecting a time past as the phrase made use of in this statute; and if in that case it was extended to a future time, why not as well in our case? especially when by that construction the intent of the legislature is answered.

2. Admitting this act does require the entry to shew for whose use the contract was at the time of making; even then our registry, if we take it altogether, will be sufficient. It appears upon the books of the *South-Sea* company (where the deed is entered *in haec verba*) that Mr. *Wilkinson* was possessed of several lottery annuities, which he subscribed in as his own, sold as his own, registered that contract as such, and which he shews continued to be his own sole property and interest to the time of such registry. Is there now after all this any room to doubt, whether this contract was made upon his own account or not? If there be no room to doubt it, and if it be a matter naturally to be collected from this registry; then it is a registry that in the strictest acceptation of the words is conform to the act of Parliament, and there is an end of their objection that way.

It is stated in the case, that no evidence was offered, to prove that this contract was for the benefit of any body but the plaintiff: what influence that will have in this question I must submit; and also another matter that appeared upon view of the *South-Sea* books, which was, that hardly any of the entries were even so strong as this signing by the plaintiff, it's being for his own proper use and benefit.

So that upon the whole matter I must submit it, that as by this registry the defendant is fully apprized who he has to deal with, and therefore has no occasion to go into equity to discover who would

would be intitled to the benefit of the contract, since he sees at one view that both the legal and equitable interest are in Mr. *Wilkinson*; the giving him all this light is performing every thing that was required of us by this act of Parliament; and therefore I hope your Lordship will be of opinion, our action of covenant was well brought, and that the question which has arisen upon this registry shall be determined in favour of the plaintiff.

Faxakerley contra. It must be admitted, that this registry is not according to the words. They require it to shew for whose use the contract *was*, the registry only shews for whose use it *is* at the time of registering.

And as it is not within the words, so neither is it within the reason and intent of the act. The preamble takes notice of the great frauds and abuses that had been committed by the late *South-Sea* directors, to the prejudice of the publick; and therefore being made for the benefit of the publick, it ought to be carried as far as may be. One main end of this act was, to discover what contracts the directors were interested in, that so the publick might have the benefit of them; and that it should not be in the power of a director, to set up a nominal person, to recover for his private use, in order to defraud the publick of so much, which was declared to be forfeited. But how will that end be attained if this registry subsists? Not at all. For supposing Mr. *Wilkinson* to have been at first only nominal, and in trust for a director; may not that director assign over the equitable interest after the contract is made, and then that will be a contract for the benefit of Mr. *Wilkinson* at the time of registering, though at the time of making it was not. By this means the act will be eluded, and those fraudulent clandestine assignments can never be got at.

There can be no inconvenience in keeping them strictly to the words of the act, for if the transaction be fair, then they may make the registry according to the words; but if the fact will not warrant it, I apprehend the legislature never intended to give the equitable proprietor a power to change hands, perhaps to the defrauding the publick, or at least the private contractor.

Mr. *Strange* says it will be sufficient, because now it appears both where the legal and equitable interest *are*; and so it does, but that is not enough, the statute intending to give the buyer an opportunity of knowing who had the equitable right when the contract *was made*.

I must therefore insist, that if this registry stands, the intent of the act is not answered; because it is liable to that objection, that

it might at first be in trust for another, which trust might afterwards be assigned or released.

Chief Justice. This was tried before me at *nisi prius*, and it being a case of very great consequence, I did not think it proper to determine it there, though I must own that I was in no great doubt about it.

It is certain that this registry is not within the words of the act, since it is not said that the contract was at first made for the use and benefit of the plaintiff. But though it be not within the letter, yet I think we are to give this act such a construction as is reasonable, considering the nature and circumstances of the case. I believe the Parliament never intended to avoid contracts upon so great a nicety as this, and therefore since the plaintiff has shewn, that he is the only person the defendant can have to do with, or be called upon by, in this matter, I am of opinion the registry is well enough, and the plaintiff must have judgment.

Powys Justice. I think this is a good registry. There is nothing in the deed that looks like any thing of a trust, and we are not to suppose it one. Besides, considering the nature of this case, it is not probable that it could be a transaction privately for the benefit of a director, because this is not a money subscription, but a subscription of lottery annuities; and every body knows that though in the case of the money subscriptions they made use of other people's names, yet they were fond enough of subscribing annuities in their own names; and the thing has answered, by the Parliament's giving greater allowances to those directors who subscribed in the most. The words of the act are *minged to take advantage*, and all they intended was to see what bargains were insisted on.

Fortescue Justice. The intent of the act was, to let the buyer know, whether he that sued him was really intitled to the money; you shall register your contract, and put your name to it. *This is for my proper use*, in a legal acceptation, denotes it *was* so; because being a *chose* in action it could not be assigned. In the nature of the thing surely it is well enough.

Raymond Justice. This is an act *ex post facto*, to lay a clog upon a legal remedy, and therefore ought to have such a construction as the plaintiff contends for. The case of the directors was not under consideration at the time of passing this act, their business having been settled before. This deed imports it to be for the benefit of the plaintiff, and no proof is offered to the contrary; we must therefore take it to be so, and I see no inconvenience therein. *Per cur'*: Judgment for the plaintiff. Trinity

Trinity Term

10 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } Justices.

Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Jenny vers. Herle.

Pas. 9 Geo. rot. 144.

ERROR of a judgment in C. B. in an action upon the case, wherein the plaintiff declares, that the defendants according to the custom of merchants drew a bill of exchange upon *J. P.* whereby they requested him to pay the plaintiff 1945 *l.* out of the monies in his the said *J. P.*'s hands belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West Buckland. That *J. P.* refused to accept it, and the defendants as drawers are liable. There was judgment in C. B. for the plaintiff, but upon error in B. R. that judgment was reversed, the whole court being of opinion, that this appointment to pay out of a particular fund, which might or might not answer, was not a bill of exchange, and exactly like the case of *Jocelyn v. Laferre* in B. R. *Pas. 1 Geo.* which was a bill drawn by an officer upon his agent, requesting him to pay out of his growing
substance;

A bill drawn payable out of a particular fund is not a bill of exchange. *L. Raym. 1361.*

subsistence; which the court on a special resolution delivered by *Parker C. J.* held not to be a bill of exchange, because in the nature of the thing no body would negotiate it, by reason of the uncertainty of the fund. And it would be of dangerous consequence to make those orders, which a man gives to his steward or bailiff, no way concerning trade, to be bills of exchange. The judgment of *C. B.* was reversed.

Crow vers. Rogers.

A stranger to the consideration can maintain no action.

IN *assumpsit* the plaintiff declares, that whereas one *John Hardy* was indebted to the plaintiff in 70 *l.* upon a discourse between this *Hardy* and the defendant it was agreed, that the defendant should pay the plaintiff's debt of 70 *l.* and that *Hardy* should make the defendant a title to a house. Then he avers, that *Hardy* was always ready to perform his part of the agreement, and that the defendant in consideration thereof promised to pay the plaintiff.

The defendant demurs; and it was insisted, that there was no consideration moving from the plaintiff to support this promise: and the case of *Bourne v. Mason*, 1 *Ven.* 6. 2 *Keb.* 457, 527. was cited, where *A.* being severally indebted to *B.* and *C.* and having a debt due to him from *D.* *C.* in consideration that *A.* would permit him to sue *D.* in his name promised to pay *B.* And it was held, that this being a matter of no trouble to the plaintiff, or benefit to the defendant, he was a stranger to the consideration, and could maintain no action.

On the other side was cited the case of *Dutton v. Pool*, 1 *Ven.* 318, 332. where it was held, that *assumpsit* lay for the daughter, upon a promise by the heir to pay her portion in case the father would not sell timber; and the case of 1 *Roll. Abr.* 32. pl. 13. where goods were given to *A.* on consideration to pay *B.* 20 *l.* And it was resolved, *B.* might maintain an *assumpsit*.

The court gave no opinion. *Adjournatur.* And *Pas.* 12 *Geo.* it was moved again, and without much debate, the court held, the plaintiff was a stranger to the consideration, and gave judgment *pro def.*

Dominus Rex *vers.* Burrige.

IN an information for a misdemeanor there was a rule for a special jury to be struck by the master, who was to chuse forty-eight out of the freeholders book, out of which each side was to strike twelve, and the remaining twenty-four were to be returned for the trial of the cause. At the trial the defendant challenged the array for want of hundredors, and the challenge was allowed; whereupon the prosecutor moved for an attachment against the defendant, as being guilty of a contempt of the rule; and upon the motion it appeared, that the defendant's agent in striking out his twelve had expunged all the hundredors.

What a contempt of B.R. L. Raym. 1364. N.B. The information was against him as mayor of Tiverton for absenting at the election day.

The defendant's counsel insisted, it was no contempt because they were not restrained by the rule; and mentioned several precedents, where the rules have been express, that the defendant should strike out twelve, and not challenge the array for want of hundredors. In Queen Elizabeth's time, *Regina v. Lord Hunsdon* was so. *Rex v. Kiffin*, 29 Car. 2. 3 Keb. 340. The Attorney General moved to add those words, but it was denied. *Rex v. Sherrard*, 1 Geo. those words are added *ex assensu*.

Sed per curiam, This is a plain contempt. Does not he defeat the rule, by insisting, that the twenty-four, who the rule says shall be returned to try the cause, shall not try it? Suppose a submission to arbitration be revoked (as by law it may) after it is made a rule of court, that is certainly a contempt. The same in a release procured from the nominal plaintiff in ejectment. In Mr. Gibbon's case he pleaded such a release *puis darrein continuance*; and Lord Trevor, who tried the cause, said he was bound to allow the plea, if they insisted upon it: but at the same time told them, he would lay them by the heels; upon which the plea was withdrawn. This is not making contempts by implication, but it is the natural construction of the rule, without which the justice intended by making these rules cannot be had. He might indeed have had a challenge to the polls, because that would not hinder the cause from going on; for they might have had a *tales*. If there was a rule to restrain the party from taking out execution, does any body think we would suffer him to bring an action of debt upon the judgment? *Per curiam*, An attachment was granted.

Burgefs *vers.* Brazier.

Et taken dis-
junctively af-
ter a verdict.
L. Raym.
1366.

DEBT on articles for a horse race, whereby it was agreed to ride without whip *or* stick, *or* other weapon, besides boots and spurs, and avers that he rode *sine flagello et baculo vel aliis armis. Nil debet* pleaded.

After verdict for the plaintiff it was moved in arrest of judgment, that the averment should have been in the disjunctive throughout, whereas upon this declaration he might have one, though he had not both; and *Cro. El.* 348. *1 Leon.* 124. were cited.

Et per curiam, This would have been ill upon a demurrer, but is well enough after a verdict. The last *vel* may be taken to disjoin the former *et*, and though the conjunctive sense be the most obvious, yet since it is capable of being taken disjunctively, it will do. *1 Ven.* 114. *Salk.* 140. *1 Mod.* 42. The jury find that he rode without whip and stick or other arms, which cannot be true if he had either. The plaintiff had judgment.

Between the Parishes of St. John Baptist in Devises and
St. James in Bishops Kenny.

Apprentice is
settled where
he lies.
L. Raym.
1371.

UPON a special order, stating that *A.* was bound apprentice to *B.* and served five years in the parish of *St. John*, but had always lain in the parish of *St. James* with his father, the sessions adjudge it a settlement in *St. John's*.

Et per curiam, The order must be quashed, the serving without lying makes no inhabitation, which is necessary to gain a settlement in the case of an apprentice: and so it was held in the case of *St. Olave Jewry*, and in the case of *St. Mary Cole Church v. Radcliff*.

Oates *vers.* Machen.

At nisi prius in Middlesex coram Fortescue et Raymond Justices.

IN an action of escape against the marshal, it was alleged, that the prisoner was surrendered to him at the Chief Justice's Chamber in the parish of *St. Bride's*, whereas it appeared upon the evidence, that it was in the parish of *St. Dunstan*. But the Judges held it well enough, this being debt, and the surrender the only thing material, and that it differed from the case of trespass, where every part of the declaration is descriptive. And the next day

Where in the declaration the description of a place is material. *N. B.* The defendant was in execution for the costs in ejectment, and it was held good notice within the statute 8 W. 3. c. 27. if signed by the lessor of plaintiff.

At Guildhall coram King C. J. inter

Boddy *vers.* Smith.

EJECTMENT for a house in the parish of *St. Peter* in *Warda de Cheape*; the defendant proved it was in *Warda de Farringdon infra*, and that no part of the parish of *St. Peter* was in the ward of *Cheape*, and the plaintiff was nonsuit.

Dominus Rex *vers.* Moise.

Coram Fortescue et Raymond Justices.

INDICTMENT against the defendant for tearing a note; whereby he promised to pay to *A. B.* so much money. *A. B.* was produced as a witness, and it was objected, that it was swearing to set up his own demand, because if the defendant was convicted, the court would oblige him to give a new note. But the Judges allowed her.

Proprietor of note a witness on indictment for tearing it.

Duel *vers.* Harding.

In Middlesex coram Fortescue et Raymond Justices.

IN an action for beating his servant, *per quod servitium amisit*, they allowed the servant to be a witness.

Servant witness in action by master for beating him.

Conventry for life, and to his first and other sons in tail male, with remainders over, remainder to his own right heirs: and as to his manors of *North Littleton, South Littleton, Offenham, Berlingham* and *Deftford*, other parts thereof in possession, to the use of the Lord *Deerhurst* for life, with remainder to his first and other sons in tail male, remainder to the use of his son *Gilbert*, and his sons in tail male, remainder to the first and other sons of the said Earl *Thomas* by his then wife, remainder to the use of the said *Francis* for life and his sons in tail male, remainder to the defendant the present Earl for life and his sons in tail male, with several remainders over, with remainder to his own right heirs: in which will it is provided, "That it should be lawful for any person or persons who should at any time then after by virtue of the said will, or any codicil or codicils to be added thereto, be seised of any of the testator's manors or lordships, lands, tenements or hereditaments, by any writing or writings under his or their hands and seals to limit and appoint any such manors or lordships (except *Great* and *Little Milton*, and all such other manors where there are any copyhold estates) and any of the said messuages, lands and tenements or hereditaments, not exceeding the yearly value of 500*l.* to any wife or wives such person or persons should have or happen to marry, for her or their respective life or lives, for her or their jointure or jointures, so as such person or persons shall have with such wife or wives upon such marriage a portion equivalent for such a jointure:" and after making other provisions in his said will, the testator appointed his wife executrix, and died without issue by her; who afterwards married *Thomas Savage*, Esq; and is still living. *Thomas Lord Deerhurst* died in the life-time of his father, leaving an infant son, afterwards Earl of *Conventry*, who died without issue, and the title descended to *Gilbert* the second son.

Upon a treaty of marriage between Earl *Gilbert* and the plaintiff his second wife, articles of agreement dated the 23d of June 1715: were made between Earl *Gilbert* of the first part, the defendant Sir *Strensham Masters*, and the plaintiff his only daughter, of the second part, and the defendants Mr. *Leigh* and Mr. *Williams* of the third part, whereby in consideration of such marriage, and of 1000*l.* marriage portion paid down by Sir *Strensham Masters* to the said Earl *Gilbert*, he the said Earl *Gilbert* for himself, his heirs, executors and administrators, did covenant, promise and agree to and with the said Sir *Strensham Masters*, his heirs, executors and administrators, and to and with every of them by the said articles in manner and form following; (that is to say) that he the said *Gilbert* Earl of *Conventry*, or his heirs, should and would at any time after the solemnization of the said intended marriage, at the request of the said Sir *Strensham Masters*, his heirs, executors or administrators,

Marriage articles 23d of June 1715.

tors, but at the proper costs and charges in the law of the said *Gilbert Earl of Coventry*, his executors or administrators, according to the power given to him the said *Earl of Coventry* for that purpose, in and by the last will and testament of the right honourable *Thomas* the late *Earl of Coventry* deceased, father of the said *Gilbert Earl of Coventry*, bearing date on or about the 24th day of *March* in the year of our Lord 1698. or otherwise by good and sufficient conveyances and assurances in the law, well and sufficiently convey, settle, limit and appoint, or cause or procure to be conveyed, settled, limited or appointed, manors, messuages, lands, tenements and hereditaments, of the full and clear value of 500 *l. per ann.* unto or upon the said *Anne Masters*, for and during her natural life for her jointure, to commence and take effect in possession immediately from and after the death of the said *Gilbert Earl of Coventry*, in case the said *Anne Masters* shall him survive, as by the said *Sir Strensham Masters*, his heirs, executors or administrators, or by his surveyor, or any of their counsel learned in the law, shall be reasonably devised, advised or required: and also that his heirs, executors or administrators, should after his death pay her during her life 250 *l. per ann.* as an addition to her jointure, half yearly, free from taxes.

And it was further agreed that *Earl Gilbert* should deposit 5000 *l.* part of the 10000 *l.* in the Bank of *England*, or invest it in Exchequer notes carrying interest, and deposit them in a box or trunk to be locked up with three locks, upon trust that the defendants *Leigh* and *Williams* should lay out the 5000 *l.* in the purchase of lands, and settle them to the use of the *Earl* for life, with remainder to trustees to preserve contingent remainders, and after his death to the use of the plaintiff for life, to be with the manors and lands of 500 *l. per ann.* aforesaid, and the said annuity of 240 *l. per ann.* in full for her jointure and in bar of dower; with other limitations to the use of the children of that marriage; and in default of such issue to the use of the said *Earl Gilbert*, his heirs and assigns, as therein is mentioned, with a power in the trustees, until a purchase, to put out the 5000 *l.* at interest, to be applied as therein directed;

The marriage took effect, and the 10000 *l.* marriage portion was paid, and 5000 *l.* part thereof, was invested in bank bills, and afterwards lent on a mortgage that had been made of part of the family estate, pursuant to said articles. And *Earl Gilbert* soon after his marriage gave directions to his steward, to find out proper lands for a jointure, and the steward according to orders perused the family settlements, and could find no other estate than the manor of *Woolvey*, which was free from incumbrances, and which

was within the Earl's power to settle; and the said manor being of little more than the yearly value of 400 *l.* the Earl paid off a 1200 *l.* mortgage on lands in *Woolston*, and agreed to make up the 500 *l. per annum* out of those lands; and accordingly, at the request of Sir *Strensham Masters*, caused a settlement by way of lease and release the 5th and 6th of *July* 1719 to be prepared, which was agreed to by all parties, and approved of by Sir *Strensham*, and actually ingrossed; wherein, after recital of Earl *Gilbert's* power by the said will, and of the articles, the said Earl *Gilbert* is therein mentioned to limit and confirm unto Sir *Strensham Masters* and Mr. *Leigh*, their heirs and assigns, the said manor of *Woolvey* and several lands in *Woolston* therein particularly mentioned, of the value of 500 *l. per annum*. And the Earl often expressed his intentions to execute the said settlement; but by his sudden illness, whereof he died, and the absence of the steward, in whose custody the intended settlement was at that time, and many other unforeseen accidents, set forth in the pleadings, the same was not executed before his death.

Earl *Gilbert* died without issue male, leaving by *Dorothy* his first wife the Lady *Anne*, now the wife of Sir *William Carew*, his only daughter and heir. But before his death made his last will and testament in writing, dated 27th of *October* 1719, and thereby (*inter alia*) gave the plaintiff (besides what was agreed to be settled on her by the marriage articles) 3000 *l.* and several specifick legacies, and made his said daughter the Lady *Anne Carew* sole executrix, who hath since proved his will, and taken upon her the execution thereof.

Francis Coventry also died without issue male. So that upon the death of Earl *Gilbert*, the defendant *William* (the present) Earl of *Coventry* became seised of divers manors and estates under and by virtue of the limitations in the said will, subject not only to the 5000 *l.* mortgage, but, as the plaintiff insists, to the 500 *l. per annum* agreed to be limited to the plaintiff for her jointure: and the plaintiff's bill is, to compel the trustees in the mortgage to call in the 5000 *l.* in order to lay it out in a purchase, and to compel Sir *William Carew* and his lady to give a real security for the 250 *l. per annum*, and to pay the 3000 *l.* legacy. And against the Earl of *Coventry*, that she may hold and enjoy the land contained in the settlement intended to be executed, for her life; but in case the indenture so ingrossed should prove defective, and not amount in equity to a sufficient appointment pursuant to the power, then that she may have a satisfaction out of the Earl's real and personal estate.

On the hearing of this cause the 18th of *April* 1722. several cases being then cited, the court was pleased to refer it to Mr. *Conway*, one of the Masters, to take account of the real and personal assets of *Earl Gilbert* come to the hands of any of the parties, who were to be examined on interrogatories, and the Master was also to take an account of the debts of *Earl Gilbert* unsatisfied at his death, and also of his legacies, and to state the real and personal assets, and any other matter he should find difficult, specially to the court: and when the Master should have made his report, this cause was to come on again to be heard thereupon; and also as to the 500*l.* *per annum* claimed by the plaintiff upon the marriage articles. At which time the court (being before attended with the cases then cited) would desire the assistance of some of the Lords the Judges and the Master of the Rolls: and all further directions were reserved until the cause should come to be heard on the Master's report.

The Master made his report, and thereby certified, that the real and personal assets of the said *Earl Gilbert* amount to 13,467*l.* 0*s.* 9*d.* over and besides the 1200*l.* and interest due on the said mortgage of *Woolston*, and that there was 3792*l.* 9*s.* 7*d.* paid and to be paid by the said *Sir William Carew*, in discharge of debts, legacies and funeral charges, besides what is due to the plaintiff, as in the report is mentioned: and the plaintiff's demands out of the said 13,467*l.* 0*s.* 9*d.* are as follows, *viz.* 250*l.* annuity clear of taxes; jewels, furniture, and other specifick legacies, amounting to 1448*l.* 1*s.* 7*d.* halfpenny; and the demand of 500*l.* *per annum* now in question, with the arrears thereof from *Earl Gilbert*'s death, being four years and upwards.

In this case it was argued for the defendant, that here was no execution of the power limited in *Earl Thomas*'s will, because the covenant with *Sir Strensham Masters* was, that *Earl Gilbert*, or his heirs, should and would, at the proper costs and charges of the said *Earl*, his executors or administrators, according to the power in the will of *Earl Thomas*, or otherwise by good and sufficient conveyances in the law, sufficiently convey lands to the value of 500*l.* *per annum*: and that therefore they could not come into a court of equity for a specifick performance, because they were not specially mentioned in the covenant to be set forth as a jointure; and that the covenant was to be interpreted as a personal covenant, because it was made with *Masters*, his heirs, executors and administrators, either to settle in pursuance of the power, or otherwise; so that *Earl Gilbert* had his election, to satisfy the covenant, either by settling the lands under the power by appointment, or by limiting any other lands to the same purposes: and according to the circumstances of this

this case he could not be said to have made his election, because from 1715 to 1719, there was nothing done, nor any request by Sir *Strensham*, to settle any particular lands in pursuance of the power. And though about July 1719, a draught was prepared and ingrossed, yet that continued to lie by till October 1719. and was never executed; and he had therefore an *animus deliberandi* continuing, and had not taken hold of the power, by appointing the lands of *Woolvey* and *Woolston* in performance of the covenant, since the indentures were only ingrossed, and never executed. And in all conveyances of this nature the *animus deliberandi* must be supposed to continue, till the act be compleatly executed. And the power not being executed, this was compared to the case of *Lanyon v. Williams*, where tenant in tail for valuable consideration covenants to sell the estate-tail and dies; a court of equity would not compel him to execute such conveyance, though there had been a decree against the tenant in tail to levy a fine and suffer a recovery: and therefore it was urged, that since the remainder was vested before the legal estate was executed by Earl *Gilbert*, the court would not compel the remainder-man in this case to execute conveyances in pursuance of this covenant.

And here they quoted those cases of law, which say that powers, which go in derogation of remainders vested, are to be taken strictly; because it was looked upon as dangerous for a court of equity to overthrow by their decrees the interests that were originally vested in the parties by legal conveyances; and the rather in this case, because there was a personal and some real estate to satisfy the covenant: and this covenant is to be considered as a debt due from Earl *Gilbert* on receiving his marriage fortune; and wherever there is a debt, the personal estate shall go in exoneration of the real, which is to support the honour and dignity of the family. And it was further urged, that the heir being expressly bound in the covenant, the estate descended to the heir should be first liable.

But it was answered and resolved by the court, that after the statute of 27 Hen. 8. c. 10. for transferring of uses into possession, the courts of common law held, that powers in derogation of estates executed were to be taken strictly; and therefore if not pursued, they would not impeach or destroy an estate already executed by legal conveyances. But in the courts of equity they soon found that the construction was too artificial, and not according to natural equity; and therefore they construed these powers as a reservation of so much of the ancient dominion of the estate, to be under the controul of the tenant for life. *Et cujus est dare illius est disponere*; and as often as any such dominion is reserved, the tenant for life

may contract about it; and where a marriage contract is made, as this was, in contemplation of the execution of such a power, it was a real lien upon the estate; for both the marriage was had, and the marriage portion paid, in contemplation that the charge should be laid on the estate in pursuance of the power. And therefore a court of equity may decree it against the remainder-man, because he claims under the devise of Earl *Thomas*, whose intention was, that such a charge should be induced on the land; and the present Earl taking the estate under the will, takes it *sub onere*: so that a court of equity may decree the charge to be made good by the remainder-man, because it is decreeing a charge in pursuance of the intent of the testator. And equity in this case was obliged to make such decree, because the first provision was made both for the honour and advantage of the family; since they could not have married according to their quality, without having a power to make such a jointure: and the present Earl takes the benefit of such power, by having such a dominion over the estate for his own advantage, and therefore he is obliged in conscience to discharge the intention of the testator in behalf of Earl *Gilbert*. And this is not like a case of tenant in tail, for when such tenant sells, and dies before cutting off the entail, equity cannot relieve; because the statute *de donis* binds a court of equity, as it does the courts of law: but if the vendee avoids the statute by a recovery, the courts of equity have never prohibited such a fictitious suit to overthrow the title of the heir in tail. Nay farther, if there was a trust in tail, and the *cestui que trust* should covenant to convey for valuable consideration, there the court of equity would oblige the heir in tail to convey; because this is a creature of equity, and out of the statute. And wherever an agreement is made, and money paid; equity does not consider the form of the conveyance, but takes it as if it were actually executed in the best manner that could be contrived at law; for the substantial part of the agreement is the price, and for that the right is transferred, and what ought to be done is looked upon as done. And therefore if a man article for the purchase of land, and sells all his estate, it would pass the lands in the articles. And this distinction was taken, that if it had been a mere voluntary conveyance, the *animus deliberandi* should have continued till the conveyance was executed; but here being a contract to settle in pursuance of that power; when an estate is afterwards set out, it shall be presumed to be an execution of that contract, which in conscience he was obliged to perform; especially in a case so circumstanced, since nothing can be objected to the value of the lands: and in this case what the persons contracting had in contemplation was an estate executed in pursuance of the power: and the words *or*

other-

otherwise, &c. are to be looked upon as auxiliary, and to aid the estate to be conveyed; so that if the Earl had settled, or purchased other lands in order to be settled, according to the contract, he might have exonerated the lands subjected to the power by Earl Thomas's will; and since the real estate now in question was mortgaged, it was necessary the covenant should be large enough to bring in all the real and personal estate of Earl Gilbert in aid of the settled estate, in case of deficiency. And therefore the covenant is not to be construed on the one hand so strictly, as to subject the heir in the first place, nor so generally as if the word heir was only matter of form, and merely the word of the conveyancer; but the intention was, that he at his election should have a power out of any other estate to satisfy the covenant, and after his death, in case the land contained in the power should be deficient, that all other his estate should be subject thereto: but since Earl Gilbert did not settle any other estate, as he might have done, to discharge the contract; it remains as a real lien on the settled estate in the first place to bind the same, as what the party had in contemplation to bind by the contract. And this is not like the cases where equity decrees that the personal estate shall go in exoneration of the real; for the reason of that is, that the personal estate is the natural fund for the payment of debts and legacies, and therefore as far as that is not specifically devised, it shall exonerate: but the articles of Earl Gilbert must not be considered as a debt, but as a conveyance of so much of the estate, over which he had a power, because his primary intention was to convey: and if it be considered in this light, there can be no application of the personal estate, since there is no debt of which the real estate was to be exonerated: and that this was the construction of powers in equity, the following cases were quoted, *Dr. Garth v. Lady Beaufry*, by Lord Somers, *Pasch.* 1695. Henry Beaufry settles lands to the use of himself for life, then as to part to his wife for life for her jointure, then to the issue male of his own body, with several remainders over; with a proviso, that if he should have any younger children, it should be lawful for him, by deed or will, executed in the presence of two or more witnesses, to limit and appoint any of the said lands (except those in jointure) to such persons and for such estates as he should think fit, for raising 500 *l.* a-piece for such younger children, to be paid at such times, and in such manner, as by such deed or will should be declared or covenanted. Henry died, leaving several younger children, but did not make any appointment. Decreed this was a charge upon the land, and bound the issue in tail, and ordered the 500 *l.* a-piece to be raised for the younger children.

Accord-

Accordingly the covenant in this case was looked on as an execution of the appointment in pursuance of the power.

2 Vern. 379.

Lady Clifford v. Lord Burlington, by Lord Keeper *Wright*, in the *Temple-Hall*. Lord *Clifford* had power to settle a jointure not exceeding 1200 *l. per annum*. On his marriage with the plaintiff, he covenants to settle on her 1000 *l. per annum*: he sends to his steward for a particular of lands of that value, and settles according to that particular. After his death it appeared that the lands so settled were but 800 *l. per annum*: the bill was against the remainder-man, to have these lands made 1000 *l. per annum*; and decreed against the remainder-man.

J. C. cited & shortly stated in Smith's Eq. Cas. 168.

Parker v. Parker, 15th June 1714. Mr. *Parker* had a power to raise 7000 *l.* for younger children, by deed or will executed in the presence of three witnesses. Afterwards by will executed in the presence of two witnesses he charged the premises with 8000 *l.* for his younger children. Decreed good for 7000 *l.*

See y^e case Hearle v. Greenbank, in 1. Feb. 298. 3 Aug. 1749. Q.

Holingshead v. Holingshead, 14 June 1708, before Lord *Cowper*. A man devises his estate to *A.* for life, with several remainders over, with a power to the person in possession to limit any part of the premises for a jointure, not exceeding one moiety: the first devisee for life, whilst an infant, marries the plaintiff, and with his mother enters into articles to settle lands of 100 *l. per annum* on the plaintiff for her jointure; but in the articles no notice was taken of the power. Before any jointure made pursuant to the power the tenant for life dies: the bill was against the remainder-man, to have the jointure made good. Decreed accordingly.

Alford v. Alford, at the Rolls, 5 December 1709. *Gregory Alford* tenant for life, remainder to his first and other sons in tail, remainder to *Francis* for life, to his first and other sons in tail, remainder to the defendant, with a power for *Francis* (after the death of *Gregory* without issue) to make a jointure: *Francis* marries in the life-time of *Gregory*, and before marriage covenants to make a jointure on the plaintiff, and to execute this power when he should come into possession. *Gregory* dies without issue male, and *Francis* survives him, but dies without making a jointure or executing this power: Bill against the remainder-man, to have a jointure made, because *Francis* surviving *Gregory* might have executed this power, and had covenanted so to do. Decreed accordingly.

So in the principal case it was decreed, that the plaintiff should hold and enjoy the lands of *Woolvey* and *Woolston*, according to the articles, and the deeds of 5 and 6 July 1719. And that the plaintiff, and the defendant the heir, and the Lord *Coventry*, should have their costs out of the personal estate, because Earl *Gilbert* ought to have settled it during his life, and the present Earl had only by his answer laid his case before the court, and had not joined in the examination of witnesses, but the plaintiff had examined to prove the allegations of the bill.

Michaelmas Term

11 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Cooper *vers.* Ginger

Where the judgment is against two, a writ of error *ad dampnum* of one only will not lie.

S. C. Ld.

Raym. 1403.

Costs on quashing writs of error are to be given in all cases.

THE plaintiff recovered judgment in *C. B.* against two defendants, and a writ of error is brought, alleging it to be *ad grave dampnum* of one only, without taking any notice of the other: and *Reeve* moved to quash it, which was done without much argument, upon the authority of a like case, *Mich. 6 Geo. in B. R. Brewer v. Turner*, *ante*, 233.

Then the defendant in error moved for costs, and upon consideration the court were of opinion he was entitled to them, the act for the amendment of the law not being confined to the case of a variance from the record, (which this is not) but having general words, *other defect*, to take in this case.

Then the plaintiff in error brought another writ of error *coram vobis*; and *Reeve* moved to quash that also, as not lying in this court; because the first writ of error being quashed, the record is not removed. He argued, that if the record had been once well removed, and the writ had abated by matter *dehors*, as death; in that

that case a writ of error *coram vobis* will lie: but this he said was never a good writ of error, and the fault appeared upon the face of the record; so that it is no more, than if an entire stranger, making a true description of the record, had brought the writ of error, which no body can pretend would be a removal of the record.

Serjeant *Comyns contra* insisted, that the record was well removed, though by a mistake in not joining the other defendant, they could not proceed to reverse the judgment; and therefore to set that matter right, they had brought a writ of error in the name of both. *If a writ of error be quashed for any other fault than variance, error cor' vob' lies.*
 3 *Mod.* 134. 1 *Roll. Abr.* 753, 929. 1 *Sid.* 104, 139. *Dyer* 356. b. *Yelv.* 3, 6. Co. Ent. 289.

Chief Justice. If the record was ever well removed, this writ of error *coram vobis* is the only one which could be had. I should think, besides a true description, that the writ should be brought by one who can entitle us to examine the record, and it is admitted, that one defendant alone cannot. I can see no reason to construe this a removal of the record; since if it be a removal, it is a removal to no purpose. *Powys Justice accord.*

Fortescue Justice. I am very doubtful in this case. A writ of error has in its nature two things, a *certiorari* to remove the record, and a commission to examine it; and that is the reason why it was never amendable at common law, because no court was ever allowed to amend their own commission. The *certiorari*-part of the writ is good, if the record be rightly described, as this was; and therefore I see no inconvenience in construing it a removal of the record. I remember a case of *Walter v. Stokoe* in this court, which was an *Ld. Raym.* action against five defendants; and one being dead, the other four, 71, 151. without taking any notice of that, bring a writ of error; and it was quashed for the same reason as we quashed the first writ of error in this case; the plaintiff in error there brought a writ of error *coram vobis*, and the cause was determined upon that, without any objection to the propriety of the writ.

Raymond Justice. I remember that case, and it was so. As to this case I should think, that when a writ of error goes to remove a record for a particular purpose, and by some defect in that writ the purpose for which it issued cannot be obtained, the record should be taken to be in the same condition as if no writ of error had been brought. If one defendant only can remove the record, I do not see why a meer stranger may not.

Adjournatur. And *Trin.* 11 Geo. without much debate they declared, that the writ of error *coram vobis* did lie.

Dominus

Dominus Rex *vers.* Theed.

Conviction
presumed
right if the
contrary does
not appear.
S.C. L. Raym.
1375.

CONVICTION for obstructing an excise officer in coming to weigh candles: and it was objected, that by 8 *Ann. c. 9.* the officer has power to enter by day or night; and if by night, then in the presence of a constable, and here it is not said whether it was by day or night; it might be by night without a constable, and then it was lawful for the defendant to obstruct.

Sed per curiam, That should have been shewn by the defendant, and then he would not have been convicted. It is enough that this conviction does not appear to be wrong: we will presume the entry to have been in the day, else it would have been said *in nocte ejusdem diei*. The conviction was confirmed.

Ravenhil's case.

Mandamus.

THE court granted a *mandamus* to swear him in ale-taster of *Honiton*. It appeared to be a previous requisite to his being chosen port-reeve, who is the returning officer for members of Parliament.

Dominus Rex *vers.* Roberts.

Proceedings
upon convictions
must be
in the present
tense.
S.C. L. Raym.
1376.

CONVICTION for profane swearing quashed, being *praestitit sacramentum* in the preterperfect tense. It was held good in substance, being for swearing 150 oaths *in his verbis*, *videlicet* by G. and cursing 150 curses *in his verbis*, *videlicet* G. damn you, without repeating each 150 times.

Between the Parishes of Ashbrittle and Wyley.

Long possession
is a settlement
till the right is
determined.

UPON a special order of sessions the case appeared to be, that thirty years since, *Humphry Card* built a cottage upon the waste in *Wyley* belonging to the Earl of *Pembroke*, and lived on it till his death, about three years since, when it descended to his daughter *Elizabeth*, then married to *John Darby*; that they entered and enjoyed it three quarters of a year, and then sold the possession of it to *John Wyvel*, who has enjoyed it ever since without any molestation from the lord; but no original grant appears. And whether *John Darby* and his family are settled in *Wyley*, where they lived three quarters of a year in the cottage in right of his wife, or
in

in *Asbottle*, which was the place of his last settlement before the marriage, was the question: and by the order of two justices, and the order of sessions, it is adjudged to be a settlement in *Wyley*.

Et per curiam, The order must be confirmed; he lived forty days in the capacity of a person irremovable, and that is a settlement of itself. Here has been an enjoyment for thirty years, during all which time the lord never claimed any thing. The least that can be made of it is a title by disseisin, and a descent is cast. This man had undoubtedly a title against all the world but the lord, and even against him it may be doubtful, after so long a possession. In ejectment he might either make or defend a title by twenty years possession. Therefore in this case there is no colour to determine against his right, when the lord does not think fit to impeach it; though if he did, it would never be allowed, to determine the title upon an order of removal, but upon an ejectment only.

Elliot *vers.* Cowper.

THE plaintiff declares, that the defendant *fecit quandam notam in scriptis per quam promisit solvere*. And exception was taken, that here is no signing by the defendant, as the statute requires; and the case of *Taylor v. Dobbins*, ante 399. had the words *manu sua scripsit*, which was the ground of the judgment in that case. But in the principal case the court held it well enough, for unless it was signed or wrote by him, it could not be such a note whereby the defendant promised to pay. Judgment for the plaintiff.

Fecit notam per quam promisit solvere, imports a signing.
L. Raym. 1376.
Pas. 12 Geo. Boyce v. Fisher, ruled the same way on demurrer.

Case of the Commissioners of Sewers for Yorkshire.

THE court held, that a *certiorari* to bring up an order made by the commissioners, for the removal of their own clerk, was of common right, and not discretionary, as in the case of other orders, where great inconveniencies may follow by inundations in the mean time.

Certiorari, where discretionary.

Dominus Rex *vers.* Simpson.

MANDAMUS to the archdeacon of *Colchester*, to swear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ he received an inhibition from the bishop of *London*, with a signification that he had taken upon himself to act in the premisses.

Swearing a churchwarden is only a ministerial act.
S. C. L. Raym. 1379.

Et per curiam, The return is ill. It does not appear that the town of *Colchester* is within the diocese of the bishop who inhibits: besides, the archdeacon is but a ministerial officer, and is obliged to do the act, whether it be of any validity or not. A peremptory *mandamus* was granted.

Townsend vers. Duppa & al'.

Attorney cannot change venue to *Middlesex* where there is another defendant joined.

AN action of trover was laid in *Worcestershire*; and *Willes* moved to change the venue to *Middlesex*, because the action against some of the defendants was as they were commissioners of bankruptcy, and they had privilege, as being barristers or attornies. But the court refused it, saying the privilege could not take place where they are joined in an action with unprivileged persons.

Brigs vers. Greinfeild and Benger.

One defendant overthrows the action after judgment *per default* against the other, it shall be stayed as to both.
S.C.L. Raym. 1372.

TRESPASS against two defendants; one suffers judgment to go by default, and the other pleads a distress for rent, and a licence from the plaintiff to sell the goods, upon which issue was joined, and a verdict for the defendant.

Serjeant *Eyre* moved to stay the judgment against the other defendant, since upon the whole record it appears the plaintiff has no cause of action. 1 *Inst.* 125. b. *Salk.* 23. *Cro. Jac.* 134. 1 *Lev.* 63.

Et per curiam, Judgment was arrested as to both.

Skipwith vers. Green.

The tenant is not estopped by describing lands in the lease.
S.C. 3 *Danv.* 272.

IN covenant the plaintiff declares, that whereas he had demised to the defendant a house and several parcels of land, which are particularly described, some to be arable, some meadow, and some pasture, and especially two meadows called *Laine's* meadows, the defendant covenanted to pay 5 *l.* per acre for every acre of meadow which he should plough up during the lease, and assigns the breach in ploughing up *Laine's* meadow, &c. The defendant pleads, that for sixty years past *Laine's* meadow has been arable land, and by times ploughed up and sowed, as the tenants thereof thought proper; and traverses, that at the time of making the lease it was meadow ground, as is supposed in the declaration.

To this the plaintiff demurs; and it was objected by *Reeve*, that the lease being by indenture the defendant was estopped, to say that what is called meadow in the lease is of any other nature; and that though they had not replied the estoppel, it was the same thing now it came before the court upon a demurrer. And he cited *Paf. 4 Ann. Kemp v. Gooday*, where in debt for rent the defendant was estopped from saying the plaintiff *nil habuit in tenementis*, it appearing that the lease was by indenture. And the same was ruled this term in the case of *Browne v. Hardwick*. L. Raym. 1154.

Sed per curiam, The indenture is to be construed according to the intent of the parties, and here the intention was only to covenant against the ploughing up real meadow. Every body knows that in deeds of this nature the parcels are very often taken from former deeds, without regard to every alteration of the nature of the land: and it would be the hardest case in the world, that if this land has been arable at one time, and laid down at another, that the tenant should be concluded by calling it by either of those descriptions. This is not the essence of a deed, as what is struck at by *nil habuit in tenementis*. It would be carrying of estoppels too far, should we extend them to this case: therefore we are all of opinion, the defendant had a right to try the fact, whether it was ancient meadow or not. The consequence of which is, that the plea is good, and the defendant must have judgment.

Welder *vers.* Buckland.

SCIRE Facias against pledges in replevin, setting out a judgment for the avowant in *C. B. prout per recordum ibidem jam residens: quod quidem recordum coram nobis certis de causis venire fecimus*, where the judgment was affirmed. The defendant demurred, and shewed for cause, that it was incongruous to say that the record remains in *C. B.* and at the same time was removed to *B. R.* by writ of error. Informality ill, on special demurrer.

Serjeant *Branthwayte* would have had it rejected as an unnecessary averment, and then it would stand with only a right reference to the record remaining in *B. R.*

Sed per curiam, You cannot say but it is informal, and that is enough upon a special demurrer. The defendant must have judgment.

Dominus

Dominus Rex *vers.* Chandler.

Indictment.
S.C. L. Raym.
1368.

INDICTMENT for secreting a woman big with an illegitimate child, so that she could not be had to give evidence about the father. The defendant demurred. *Et per curiam*, Judgment for the defendant, for it cannot be illegitimate before born, there being always a possibility that it may be born in lawful wedlock.

East-India Company *vers.* Glover.Eadem *vers.* Lutman et al'.

Suffering
judgment to
go by default
is an admission
of the
contract declared on.

THE plaintiffs declared upon a sale of coffee at so much *per* hundred, which the defendant was to take away by such a time, or answer in damages. There was judgment by default, and on executing a writ of inquiry before Chief Justice Pratt at Guildhall, he refused to let the defendant in to give evidence of fraud on the side of the plaintiffs at the sale, because he said the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading *non assumpsit*; and now they were only upon the *quantum* of damages.

The Dutch West-India Company *against* Jacob Senior
Henriques van Moses. In C. B.

Dutch West-
India company
sue for
money in
England
which was
borrowed at
Amsterdam,
and when it
was payable
in Bank there.
And have
judgment.
S.C. L. Raym.
1532.

ONE borrowed money of the Dutch West-India company, which he by articles covenanted to pay in Bank at Amsterdam. The Dutch West-India company sued those articles here in England, and called themselves *Generalis societas Belgica privilegiata ad Indos occidentales negotiandum*, and laid the articles to be made at Amsterdam in Holland, *viz. apud London in parochia sanctae Mariae de arcubus in warda de Cheap*.

Upon the trial it appeared, the money was borrowed at Amsterdam in Holland, and by the covenant was to be paid in Bank there: and that this company had never sued by this name before, or ever had any particular name given them by any act of the States; but upon the dissolution of an old West-India company, it was declared, that there should be still a general West-India company, the members of which should be privileged to trade to the West-Indies, and that all others should be prohibited.

Note;

Note; The jury found, that this was the same company that lent the money.

Upon the trial at *nisi prius* before King C. J. two points were reserved for the consideration of the court: 1. Whether these articles could be sued in *England*. 2. Whether this was a good name for the company to sue by.

Chestyre Serjeant for the defendant agreed, that where a covenant is made beyond sea, and is to be performed here, or *e converso*, an action may be well brought upon such covenant in *England*: but when a covenant is made beyond sea, and is to be performed there, it cannot be tried here, because there is no place from whence the *venue* shall come, nor can our Judges be informed of the law of that country: and this is resolved in *Dowdal's* case, 6 Co. 47. b. It hath been always held, that if a bond be said to be made at *Bordeaux in Regno Franciae*, it wants trial at our law; and whether it arises upon the evidence, or appears upon the pleading, is not material. *Lutw.* 950. Trespass done at *Fort St. George in partibus transmarinis*, is not triable here. Lord Chief Justice *Vaughan* in his treatise of *Wales* says, if a bond be made in *Wales, Ireland, or Scotland*, it cannot be tried in *England*. The covenant in the present case, appoints the money to be paid at *Amsterdam*, and therefore cannot be performed in any other place, and the defendant cannot oblige the plaintiffs to accept the money here, but is confined to pay it in *Holland*.

As to the second point, whether this be a good name for the company to sue by, I apprehend it is not a sufficient name: for this corporation never having any particular name given them, are not enabled to sue even in *Holland*, much less in *England*. Corporations made by act of Parliament are to be taken notice of; but when private corporations sue, they must produce their charter or grant by which they are constituted, and shew to the court that they have a name and a capacity to sue. And he said that the name by which the plaintiffs were called in the declaration, was different from the common name that they are known by.

Pengelly Serjeant *contra*. This is an action brought for the loan of money, which is a thing clearly transitory and personal; and in such a case the defendant is a debtor, wherever he goes, and may be sued wherever he can be found. I admit that where it appears from the party's own shewing, that the bond was made at *B. in Regno Franciae*, that the court here is ousted of jurisdiction; but in this case the covenant is said to be *apud Amsterdam in London in parochia*, &c. and it being not traversable, the court hath a

Salk. 290.

sufficient jurisdiction. It is the common practice to bring actions here upon bills drawn in *Holland* payable in *France* and assigned to *Dutch* merchants. An action was brought upon a bond which appeared to be dated at *St. David's* in the *East-Indies*; and it was resolved, that if it had been laid in the declaration to have been made at *St. David's* in the *East-Indies*, viz. in *London in parochia*, &c. it had been sufficient, and suable here. In *Trin. 7 Ann.* in *B. R.* an action of trover was brought for timber cut in *Ireland*; and it was objected, it could not be tried here, because title of land would come in question: But per *Holt C. J.* *et totam curiam*, This action being merely transitory, may be sued any where. This was the case of *Brown v. Hedges*, *Trin. 1708.* Vide *Styles* 331. *Rogers v. Done*. And to this point a case was cited by *Dormer J.* where *William Penn* was sued here for rent, upon a lease of lands in *Pensylvania*; and it was adjudged the action well lay.

To the second point *Pengelly* said, Though the company had no certain name given them by any act of the States, yet they may collect a name by reputation from their business; and being always known by that name, may be well sued by it. He cited the case of *Queen's College Oxford*, 11 Co. 19, 20, 21. That college had no name given them at their foundation, but having received their foundation, and several other benefactions from the Queen, they collected by reputation the name of *Queen's College*, by which name they sue and are sued. *Hob. 122, 124.* And this present case is the stronger, because there is not any other company that pretends to use this name that the plaintiffs sue by, and they are found by the verdict to be the same persons who lent the money. If a particular name be given to a corporation, and in suing, when their name is turned into *Latin*, though there be some circumlocution in naming them; yet if it appear to be the same corporation, it is sufficient. So in an information for words, or for a libel, if the words or libel be set forth in *Latin*, for the very words need not be set forth, the jury may find the defendant guilty of those words.

Per totam curiam, The action is well brought: and they were all of opinion for the company in both points. And the judgment was affirmed in *B. R.* and in Parliament.

Wyvil *vers.* Stapleton.Shelburne *vers.* Eundem.

ERROR of a judgment in C. B. in debt, wherein the plaintiff declares, that by writing between him and the defendant it was agreed, that the plaintiff should upon payment or tender of 1360*l.* by the defendant on or before the day of shutting of the books, transfer to him 200*l.* South-Sea stock; in consideration whereof the defendant agreed, that he would on or before the shutting of the books accept the stock, and would then pay for the same; with a proviso to enable the plaintiff to sell it out, if the defendant did not accept it: then the plaintiff avers that he was at the South-Sea-house the day of shutting the books, and then offered to transfer; but the defendant did not appear, whereupon he sold out the stock, and brings his action for the deficiency. The defendant pleads a feoffment in satisfaction, and on demurrer judgment is given in C. B. that the plea is good; *ideo querens nil capiat per billam.*

A feoffment is not pleadable in satisfaction of a specialty.

It was agreed on all hands that the plea was bad, so that the reason on which the court below founded their judgment was not right; but whether upon the whole record the judgment was not warranted was a question.

Reeve objected to the declaration, that the plaintiff had shewed no cause of action, for that the covenant to pay was only on acceptance, and here was only a tender (and that insufficiently alleged) but no acceptance. The defendant covenants to accept on or before the shutting the books, and then (that is) upon such acceptance to pay.

Fazakerley *contra* insisted, they were mutual covenants; or if not, yet the plea of a feoffment in satisfaction admits every thing necessary to entitle the plaintiff to be satisfied. *Cro. Car.* 384. *1 Vent.* 114, 126. *Hob.* 233, 198. *2 Saund.* 180. *1 Sid.* 466. *Shore.* 213.

Chief Justice. I think the judgment of C. B. ought to be reversed. The construction the defendant puts upon this covenant is a very strange one, for it is no less than to discharge himself of one covenant by the breach of the other: it is true, says he, I did not accept the stock as I ought to have done, and therefore I am discharged from the payment of the money. This is so harsh, that if

if any fairer construction can be made of it, I am sure it ought. Now I think the natural import of it to be, that *then* should not relate to the actual acceptance, but only to the time at which he covenants to accept. If so, then as these are mutual covenants, the breach is well alleged in non-payment of the money, and if the plaintiff has failed on his part, it will be no excuse here, because the defendant has his action to right himself. *Powys J. accord*.

Eyre Justice. This not being an action for the whole money, but only for the deficiency, I take it the mutual remedy is gone. And if so, then a tender and refusal are necessary to be averred, to entitle the plaintiff to sell out the stock. This is not a sufficient tender, either as to time or place; as to the time, if nothing be shewn to the contrary, the last part of the day is what the law appoints, and the plaintiff is deficient in that; and as to the place, it should have been averred, that the *South-Sea-house* is the proper place, for we cannot take notice of it. *Lancashire v. Killingworth*, (*Salk.* 623.) entered *Trin.* 12 *W.* 3. *rot.* 369. *Shales v. Seignoret*, *intr. Pasch.* 10 *W.* 3. *rot.* 115. and adjudged *Pasch.* 11 *W.* 3. *Lutw.* 516.

Fortescue Justice. If it be necessary to aver a tender, this is certainly naught; but I am not clear that there is any occasion for it. I think the payment is so far from being to be subsequent to, or upon the acceptance, that it is the very first act to be done according to this contract, which is, that the plaintiff shall upon paying transfer, and the *ad tunc* refers to that time. *Per cur' ulterius concil*.

A covenant to pay upon transferring is mutual.

And *Mich.* 11 *Geo.* it was argued a second time by Serjeant *Pengelly* for the plaintiff, and Serjeant *Comyns* for the defendant; and the court kept them to the point of the mutual covenants, declaring that the tender and the pleading over were both to be laid out of the case.

Serjeant *Pengelly* insisted, that the first act was to be done by the defendant, the covenant on the plaintiff's part being only upon payment or tender to transfer, and then comes the clause for the defendant to accept and pay, and the proviso to sell out is on any default of the defendant.

Serjeant *Comyns contra* insisted, that in the nature of the thing there must be something done on the part of the plaintiff, at least he ought to be there, and ready to transfer; and wherever the defendant's act depends upon an act to be done by the plaintiff, it is not enough to say they are mutual covenants.

Adjournatur. And in a few days the Chief Justice delivered the resolution of the court. The objection is, that the plaintiff should have done the first act by transferring, or tendering at least, else how could the defendant *adtunc accipere et solvere proinde*. This depends upon the wording of the indenture and the intent of the parties. It could never be the intention to make the payment depend upon the defendant's own acceptance. *Adtunc* is the time mentioned for the transfer, not the act of transferring, and it would be unreasonable to oblige the plaintiff to part with the stock first, since every body knows that was not the nature of these agreements. The money is not to be paid as the consideration of a transfer, but of the covenant to transfer; and the true consideration in this case is the remedy, which the defendant has upon the covenant to transfer. We are all of opinion that these are mutual covenants, and therefore though there is no tender sufficiently alleged, yet the declaration is well enough. And the judgment below being for the defendant, when it should have been for the plaintiff, it is erroneous, and ought to be reversed. We accordingly reverse it, and give judgment for the plaintiff.

N. B. This judgment of reversal was afterwards reversed in Parliament, and the judgment of C. B. set up again.

Afterwards the court was moved for their direction to the Master in taxing the costs, the plaintiff insisting on full costs to this time, the statute of *Gloucester*, 2 *Inst.* 288. extending to all costs consequent upon the suit.

Sed per curiam: At common law there were no costs upon any writ of error, and 3 *H. 7. c.* 10. and 8 *W. 3. c.* 11. extend only to the case of affirmance of a judgment, and that very reasonably; for why should any man in the case of a reversal pay costs for the error of the court below? We are in this case to give such judgment as the court below should have given, that is judgment for the plaintiff, with his costs to that time. They could have no consideration of the costs upon the writ of error, and therefore let the master tax the plaintiff such costs as he would have been intitled to in the court below; but as to costs upon the writ of error in this court, he can have none.

No costs on reversing judgments.

Aston *vers.* Blagrove.

THE plaintiff declared, that he was a justice of peace, and that upon a *colloquium* of him and the execution of his office, the defendant said, "You are a rascal, a villain, and a liar."

Words of a magistrate, where actionable.

S. C. Ld.

Raym. 1369.

After verdict for the plaintiff it was moved in arrest of judgment, that these words are not actionable.

Chesbyre Serjeant pro quer. There is a great difference between magistrates and common tradesmen: words of the latter must affect them in their particular way of dealing, but any thing that tends to impeach the credit of the former is actionable. A justice of peace is sworn to do his duty. What can be worse than to call a man a villain? An action lay for claiming a man as a villain, *Keilw.* 34. And the pillory we call a villainous judgment. The word *liar* does not signify a single erring from the truth, but denotes a habit of lying. It is actionable to say of a tradesman, "He keeps false books."

Reeve. It must be taken now that the words were spoken in relation to his office, which will much aggravate the matter. I agree, these words spoken of a common person would not be actionable; but the distinction between magistrates and others has been often allowed. *Mo.* 243. *Cro. Car.* 199. 1 *Vent.* 50. 1 *Sid.* 432. 1 *Lev.* 280. 2 *Cro.* 223. *Cro. Car.* 14. Words that are actionable will not be indictable, unless they tend to a breach of the peace; but though not indictable, yet they may be actionable. *Mich. 4 Ann. B. R. Regina v. Soley* (mentioned in the case of *Regina v. Wrightson*, *Salk.* 698.) "Mr. Soley is not fit to be a justice, "for if a cause comes before him he'll give it right or wrong for "Mr. G." were held not indictable, but yet no body will say that they are not actionable.

Girdler contra. In *Show. Parl. Cases* 12. amongst others the word *liar* is mentioned as not actionable; and the principal case there was words of a justice, *You are disaffected to the government*, and held no action lay. As to *villain* and *rascal*, they likewise are not actionable. 2 *Cro.* 58. *Yelv.* 64. 4 *Co.* 15. a. 2 *Ed.* 4. 4. b. *Mar.* 82. *Goldf.* 115. 4 *Co.* 16. a. *Mo.* 418. 1 *Roll. Abr.* 57. pl. 30. 1 *Vent.* 258. *Salk.* 696. *Hob.* 117. *Cro. Jac.* 90. *Hardr.* 501. 2 *Cro.* 196. 1 *Lev.* 277, 148.

Reeve. In many of those cases there was no *colloquium* of the office, and the words were capable of a good as well as a bad sense, which these are not.

Curia advisare vult. And this term the Chief Justice delivered the opinion of the court, That though *rascal* and *villain* were uncertain, yet being joined with *liar*, and spoken of a justice of peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff.

Hilary

Hilary Term

11 Georgii Regis. In B. R.

Sir John Pratt, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } Justices.

Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Memorandum: Mr. Justice Raymond was absent all this Term, being one of the Commissioners of the Great Seal.

Whitechurch *vers.* Whitechurch.

In Canc' coram Gilbert et Raymond.

SIR Jeffery Gilbert, one of the Commissioners of the Great Seal, delivered the resolution of the court.

The lands in question were mortgaged to *Edward Whitechurch* for a term of five hundred years, and upon advancement of a further sum of money, another term of two thousand years, from the expiration of the first term, was made to trustees, in trust for the said *Edward Whitechurch*; after this *Edward Whitechurch* bought in the inheritance of the mortgagor.

Where the owner of the fee with a term to attend the inheritance, makes an incomplete devise to carry the inheritance, it shall not be set up in equity as a devise of the term. S. C.

Edward

2 Will. 236.
Gilb. Rep. 160.
9. Mod. 124.

Edward Whitechurch being so possessed of both the said terms, and of the inheritance of the said lands, he wrote his will with his own hand, and devised these lands to *William Whitechurch* his younger brother for life, remainder to *Edward Whitechurch* his nephew in tail, with divers remainders over. But this will was never signed or executed in the presence of three witnesses, as is requisite by the statute 29 Car. 2. c. 3.

It is plain by this will the testator intended to pass an estate-tail to *Edward Whitechurch*, which he had power to do by the statute 32 Hen. 8. c. 1. But by the 29 Car. 2. c. 3. "That all devises
" of any lands and tenements deviseable, &c. shall be in writing,
" and signed by the party so devising the same, or by some other
" person in his presence, and by his express direction, and shall be
" attested and subscribed in the presence of the said devisor, by three
" or four credible witnesses; or else they shall be utterly void and
" of none effect." So that where this solemnity is wanting, the statute makes such devise of lands utterly void. But in this case the devisor had a term of years in him. Now though a term for years be within the words of the statute, yet the statute doth not extend to it, for the term would have gone to the executors, had it been undevised, and it never was the intent of the statute to take any thing out of the hands of the executors: but where the will comes to derogate from the interest of the heir, for whose security, among other things, the statute was made, there the will ought to have the solemnity of the statute.

It will be said, that if this will cannot pass the inheritance, yet the testator intended something should pass by this devise; therefore the term shall pass, for which the solemnity of the statute is not requisite.

But when the testator had the inheritance in him, and designed to pass it as such by this devise; nothing else shall pass but what he intended. Besides, the will was not compleat, but under deliberation; and whilst it was such, you cannot construe that will so as to pass any other interest in the mean time, till such time as he had perfected it; and therefore this being a will *in fieri*, a court of equity will not carry it further than the testator himself has done.

And in this case there is to be no argument made from the dominion and intent of the testator, for the intent of the statute was to restrain the exercise of his dominion: and this statute has always had a large construction, in order to remedy those mischiefs, which it was designed to prevent, and therefore it extends to all estates of freehold.

freehold. For ever since the 32 H. 8. by which lands are made devisable, great inconveniencies were found in the devising of estates, for want of a solemnity. And in the making of this statute, which was contrived by the Lord Chief Justice *Hale*, and the most learned men of that time, they went upon the foot of the old *Roman* law, by which at first seven witnesses were necessary to a devise of lands, but afterwards they were reduced to three, the number which this statute requires: and since this statute was made with so much care and caution, to prevent those inconveniencies, which attended the common way of devising estates before, it ought to be strictly pursued, and no relief be given in a court of equity where any part of this solemnity is wanting. Therefore in this case nothing shall pass by the devise, but the inheritance shall go to the heir, and the terms must attend it. The decree of the Master of the Rolls was confirmed.

Dominus Rex vers. Hullston.

THE court granted an information in nature of a *quo warranto* against the defendant for exercising the office of steward of a court leet; but said they would not grant it in the case of a court baron, that being only a private right, and no court of record.

Quo warranto lies against a steward of a court leet. *See Andr. 14.*

But quare as to the propriety of this distinction between a court leet & court baron, no such information ought not to be grantable in both cases. See Cov. Jam. 2. 59.

Strong vers. Howe.

MR. *Strong* who had a mortgage on the estate of Mr. *Howe*, had deposited the writings in the hands of his counsel, who upon a proposal to pay the money delivered the writings to Mr. *Howe's* brother, who was an attorney, and took a receipt from him to re-deliver them upon demand. Mr. *Howe* the attorney intrusted them with the mortgagor, who immediately took up 200 l. and left the writings as a pledge, without the privity of his brother. And now upon motion against the attorney the court made a rule on him to re-deliver the writings at his peril, otherwise an attachment: for they said, they would oblige all attornies to perform their trust, and how hard soever this might be as between him and his brother, yet between him and Mr. *Strong* it stood only upon the note, by which he had engaged to return the writings in all events.

Attorney ordered by rule to deliver writings.

Amyon vers. Shore.

IN assault it was once well laid, but then went on with a *cumque etiam*, and laid another assault: there were intire damages: and it was moved in arrest of judgment, that the last assault was not

Cumque etiam in trespass ill.

positively charged, but only by way of recital. *Lee contra* would have had the court construed *cumque* as *moreover*: but they said it had been always taken only as a recital in these declarations; so the judgment was arrested.

Dominus Rex *vers.* Inhabitantes paroch' sancti Gregorii in villa de Sudbury in com' Suffolk.

Noctanter.

UPON search of precedents, and opposition by the clerks of the plea side, it was held, that proceedings upon a *noctanter* must be of the crown side.

Martin *vers.* Pritchard.

Payment before the day, how to be replied to.

ERROR of a judgment in *C. B.* in debt upon bond: on the *oyer* the condition appeared to be for the payment of 100*l.* and interest on 5 December 9 Geo. and the defendant pleads, that before purchasing the original, *scilicet* 1 December 9 Geo. he paid the principal and interest. The plaintiff replies *non solvit modo et forma*, and on demurrer judgment is given for the plaintiff.

Strange pro quer' in errore objected, that the issue upon payment before the day was immaterial; and cited the case of *Merril v. Jocelyn in B. R. Trin. 13 Ann.* where on the like issue a verdict was found for the plaintiff, and the judgment reversed.

But the court took a difference between the two cases. The present case being pleaded as a payment with interest, it must be taken as a plea upon the act for amendment of the law, and then the day is not material, the only point upon that statute being whether it was paid before bringing the action.

To this it was answered by Mr. *Strange*, that the act for amendment of the law was not applicable to this case, the act only giving a plea of payment *after* the day, when the defendant had broke the condition. And as to the interest, he said it ought to be so pleaded even in the case of payment *before* the day, because the bond carries interest from the date.

But notwithstanding this (*Poswys* and *Fortescue* Justices being only in court) the judgment was affirmed. *Quaere?*

Easter

Easter Term

11 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

James Reynolds, Esq;

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Dominus Rex vers. Weston et al'.

INDICTMENT against six jointly and severally for exercising a trade: quashed, because there ought to be distinct indictments. Cannot indict two persons together for distinct offences.
2 Roll. Abr. 81. pl. 6.

Stead vers. Lateward.

UPON confideration the court held, that there must be the same notice given of executing a *scire fieri* inquiry, as in the case of a common writ of inquiry; and said it had been so ruled formerly, *Mich. 12 Ann. Crawley v. Hayward.* Practice. L. Raym. 1382.

Clarke *vers.* Othery.

No more costs
than damages.

IN trespass assault and battery on the plaintiff the declaration went on, *necnon insult' fecit* upon the horse of the plaintiff. Verdict *pro quer'* and 20 s. damages; and it was moved to have full costs on account of the special matter about the horse; but refused upon consideration, and the plaintiff had no more costs than damages,

Dominus Rex *vers.* Episcopum Cestriens'.

A deed is
good though
executed be-
fore stamped.

UPON a writ of error out of the county palatine of *Lancaster*, it appeared upon a bill of exceptions, that a patent produced in evidence was not duly stamped at the time of sealing, or at the time that it was first produced; and the whole court were of opinion, it was proper evidence, being stamped at the time it was produced on the trial; for they said the act never intended to avoid deeds that were not stamped, but only to add a penalty to enforce the duty, and here the penalty had been paid. Judgment affirmed.

Phillybrown *vers.* Ryland.

In action for
being exclu-
ded from the
vestry room
must shew the
parish had a
right to meet
there.
L. Raym.
1388.

THE plaintiff brought a special action upon the case for excluding him from the vestry room, and upon demurrer the court made no difficulty, but that such an action was maintainable: however in this case they gave judgment for the defendant, it not being averred that the parish had any property in this room, or right to meet there, so that for ought appears it might be defendant's own house, and then he might let in whom he pleased, and refuse the rest: and this was a fault in substance, and needed not be shewn for cause of demurrer.

Dominus Rex *vers.* Wilkins.

Practice.

PER curiam, Attachments for a rescue must be made returnable at a general return, though the original process was at a day certain.

Foot *vers.* Prowse Major' de Truro.

THE mayor was to be chosen out of the aldermen, who are *annuatim eligend'*: the fact on a trial at bar was, that the aldermen present at his election had been in several years, and had none of them been re-elected within a year. On a bill of exceptions, the court was of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But upon error in the Exchequer Chamber, and two solemn arguments, the judgment was reversed: and it was held, that the words *annuatim eligend'* were only directory, and that an annual election of them was not necessary to make an election in their presence good: and King C. J. *de C. B.* who delivered the opinion of the court, compared it to the case of a constable and other annual officers, who are good officers after the year is out, until another is elected and sworn. The reversal affirmed in Parliament.

Annual officers continue till another is chosen.

Kent *vers.* Kerry.

ERROR of a judgment in *C. B.* in dower, *de tertia parte* of three houses and a tenement. Judgment for the defendant, but reversed; because it does not lie of a tenement. 2 Cro. 125, 621.

Dower lies not of a tenement. L. Raym. 1384.

Dominus Rex *vers.* Hearle.

MANDAMUS to swear in one Pender, mayor of Penryn: return, that an information in the nature of a *quo warranto* was exhibited against him, to shew by what authority he exercised the office of mayor, whereon two issues were joined, one whether he was duly elected, and the other whether he was duly sworn: the first issue was found for the defendant, and the second for the King, whereupon judgment of *ouster* was given against him; and because he was never since elected mayor, he cannot now swear him in according to the command of the writ.

Mandamus lies not to swear one who has had judgment on an information against him for an usurpation.

Hussey pro quer'. The question is, whether after this judgment of *ouster* he be intitled to a *mandamus*, to swear him in, in consequence of his precedent election. And I shall insist, that though he was justly punishable for acting before he was sworn; yet his election was not so totally done away, but that it still subsisted.

The nature of this corporation appears upon the writ and return to be, that no particular time is appointed for the swearing, and that he is to hold over; so it is no objection that the year is out. It must be agreed he had once a right to be sworn, this writ gives him no right; he is still liable to be prosecuted, if the first election be gone. It is therefore proper to be determined upon a new information after he is sworn, rather than to refuse to put him in a capacity to assert his right. The return admits the truth of our suggestion in the writ, that *Pender* was duly elected, and has not been sworn: will it not be hard to say, that because he once acted before he was sworn, therefore for the future he shall never act at all? He confesses he did wrong to act before swearing, and submits to be punished as an usurper for so doing; but now says he I am convinced of my error, and am desirous of conforming my self to the rules of law for the future. He had a right to the office before he was sworn, though he had not a right to act; he does not forfeit the office by acting, but subjects himself to punishment.

Besides it is considerable, whether his acting can forfeit the interest which the corporation have in this election; for it appears upon the return, that if this election be gone, the corporation (as the law now stands) is gone also; this being an election upon a death, so as there is no predecessor to hold over. *Old N. B.* 170. 1 *Sid.* 54, 86. 2 *Inst.* 282. 9 *Co.* 28. *Rast.* 540.

The judgment upon an information is not final as to the right, though in a writ of *quo warranto* it is. 1 *Sid.* 54. 1 *Inst.* 293. The judgment here is not that the franchise shall be seized into the King's hands.

This man must be considered as one that got into possession before his time. If a copyholder enters before admittance, the lord may turn him out; but does any body think he is not intitled to be re-admitted? A feoffee enters before livery, but is not he capable of livery afterwards? *Lit.* § 70. 1 *Inst.* 56, 57.

Chapple Serjeant contra. We confess the election, and avoid it: we say you were once intitled to the office, but you were guilty of an usurpation, and were excluded upon that account: the words of the judgment are, that in the said office *nullo modo se intromittat, sed penitus abjudicetur et excludatur.* Can any words be stronger to destroy the first election than these? Even in a writ of *quo warranto* they are not. *Rast.* 540. *Co. Ent.* 527, 537, 540, 559. As he does not pretend to any new right, we say he can have no *mandamus* to be sworn into this office.

Curia advisare vult. And this term, Mr. Justice Reynolds being come into court since the argument of this cause, the counsel were directed to repeat what they had before offered; and then the court delivered their opinions.

C. J. The party certainly comes in time for this *mandamus*; though the year is out, it appearing that he is intitled to hold over, and that no other person hath been since elected into this office. I think the judgment on the information was right, for he then appeared to us as an usurper, and we punished him as such; and I believe no precedent can be shewn where in these informations the judgment was ever entered in any other manner. If the judgment is right, we must give the words of it their full latitude: they import an absolute exclusion from the office, and are we to intend a *quousque* in any case? or are not the words of this judgment as strong as the case of a corporate amotion? It seems to me that the election is done away, and that unless there had been a new election since the judgment, the party is not intitled to this *mandamus*. Powys J. *accord*'.

Fortescue J. A *quo warranto* is the King's writ of right, and as against the crown want of swearing is as much as want of an election: the jury therefore have found in effect, that he had no title to this office, and then of course he is to be excluded from it by our judgment. I never heard of any other judgment, nor can any thing be more reasonable, than to exclude him who appears to have no title. Where the franchise claimed is such as may subsist in the crown, the judgment is to seize it into the King's hands, but where (as in this case) it cannot be exercised by the crown, the judgment is only to exclude the party. This judgment is as strong as a forfeiture or amotion. We have expressly adjudged, that he shall never take upon him this office, and therefore it would be absurd for us to command him to be sworn in consequence of a right prior to our judgment. If a man who has one right, claims that in a manner different from his grant, he loses even the right granted; as in 2 H. 7. 11. where one had a grant of a fair for one day, and he claimed it as a grant for two; the judgment is that he shall lose his fair, and that grant could never be set up again.

Reynolds J. I should have had some difficulty in giving this judgment, had I been in court when it was pronounced, for I know of no certain form of words in judgments, but every judgment may and ought to vary according to the circumstances of the

the case: and it is no new thing to meet with judgments that are only *quousque*, as I think this might have been. But whatever my opinion might be in that case, yet in the present case I must concur with my brothers, because I am bound to take and consider this as a judgment; and whether he should have been barred or not is not material, since in fact he is barred, and will be so, till that judgment is reversed by writ of error. *Per curiam*, The return must be allowed.

On error in Parliament adjudged that error does not lie, and the writ quashed.

Trinity

Trinity Term

11 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

James Reynolds, Esq;

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Morris vers. Lee.

THE plaintiff declares, that the defendant made a promissory note under his hand, whereby he promised to be accountable to the plaintiff or order for 100 l. value received, and counts upon the statute.

Note to be accountable for money is within the statute.
L. Raym.
1396.

After verdict for the plaintiff it was moved in arrest of judgment, that this was not within the statute, and that the distinction had always held between negotiable and accountable notes: that no note was negotiable, that was not for the payment of money absolutely, according to the cases of *Appleby v. Biddle*, and *Smith v. Bobeme*, whereas the defendant in this case might discharge himself by payment of the plaintiff's debts or otherwise.

Sed per curiam, There are no precise words requisite to make a promissory note: it is enough if it may be brought within the intention

tention of the act. This is for value received, and he makes himself accountable to the order; a fourth or fifth indorsee can settle no account with him, therefore we must take the word *accountable* as much as if it had been *pay*, and the plaintiff must have judgment. *Quaere tamen.*

Dominus Rex *vers.* Inhabitantes St. Leonard Shoreditch.

Parish rates.

ON a special order for a scavenger's rate, it was stated, that in the parish there were three divisions, and this rate was made for one only, but that in this division there were no churchwardens or overseers residing, though the parish at large had such officers. At the sessions this rate was quashed, on account that there ought to have been a general rate for the whole parish: and now upon bringing all orders before the court it was offered in support of the first order, that the 2 & 3 W. & M. st. 2. c. 8. had the word *place* as well as *parish*; and therefore a rate for the division was good. *Sed per curiam*, Whatever it might have been in case the churchwardens and overseers had resided in this division, yet this being made for a place that has no such officers, can never be maintained. The sessions therefore did right to quash the rate, and the order of sessions must be confirmed.

Vaughan *vers.* Evans.

Prohibition to a suit in *Wales* where the process was served out of the jurisdiction.
L. Raym.
1408.

A Bill of foreclosure was brought at the grand sessions of *Montgomeryshire*, and the *subpoena* was served in *England* upon the defendant, he and the plaintiff having both estates within the jurisdiction, the mortgaged premises lying there also. *Et per curiam*, A prohibition ought to go. They can serve no process out of the jurisdiction: and though the court of Chancery here do send *subpoena's* to *Ireland* and *Scotland*, yet the right of doing so was never established.

Fortescue J. Said positively they could not do it, and cited *Hutt. 59. Cumber. 468.* A prohibition was granted.

Dominus Rex *vers.* Venables.

Alehouses.
L. Raym.
1405.

THERE was an order for suppressing an alehouse; and after that a second order, reciting that he had since continued to sell ale, and therefore committing him for three days, and till he finds sureties not to sell without licence.

It was moved to quash the last order for want of shewing a summons or appearance of the defendant; and *Salk.* 181. and the case of *The Queen v. Green*, 12 *Ann.* were cited. *Sed per curiam*, We will not presume they acted unlawfully: a summons is certainly necessary, and the justice is punishable if he proceeds without: you never shew notice to the parish that is to be charged in orders of removal. The order was confirmed.

Dominus Rex vers. Inhabitantes de King's Langley.

AN order in nature of a pass for a child of two years old as a vagrant was quashed; it not being of age sufficient to commit an act of vagrancy within the intention of the statute.

Child of two years old cannot be a vagrant.

Hutton vers. Stroubridge.

ON the 2d of June (which was in *Trinity* term) the defendant brought a *habeas corpus*, and put in bail: the plaintiff did not proceed in that term, or in *Michaelmas* term, but in *Hilary* term delivered a declaration; and, upon my motion, the court held the defendant's attorney was not bound to accept it, though but a part of *Trinity* term elapsed after bringing the *habeas corpus*; so as there were not two whole terms.

Morfoot vers. Chivers et ux'.

SCIRE fieri inquiry against husband and wife, as she was executrix in her right, brought by the plaintiff as executrix, upon a judgment recovered by her on a bond to her testator. The defendants demurred, and shewed for cause, that it was not alleged in the *scire fieri* inquiry, that the testator of the plaintiff was dead. And *Martin pro defendente* insisted, that though this might perhaps be well enough upon a general demurrer, yet surely it was informal, and would be ill upon a special demurrer, which was this case.

In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be shewn. *Ld. Raym.* 1395.

Strange contra. In a common *scire facias* by an executor to revive a judgment recovered by the testator, it may perhaps be necessary to shew him to be dead, because that is the first act or process after his death; but in this *scire facias*, which comes after a suit by the executrix, and wherein she has recovered a judgment, which must be taken to be good, there is not the same necessity: it may as well be expected to be repeated in every process, which

was

was never done. When the executrix first comes into court, she must shew herself to be compleatly so; but when she has once done it (as it must here be taken she has, else she could not have had judgment *as executrix*) it will be to no purpose to repeat the same thing over again. In every declaration it is necessary to say the defendant is *in custod' marr'*, to give this court a jurisdiction, but it is never taken notice of in the subsequent proceedings. In the first suit the defendants might have pleaded *ne unques executrix*, but not having done it at first, they have lost the opportunity: if we had averred in this *scire facias* that the testator was dead, the defendants could not have been admitted to traverse that suggestion, after a judgment against them at the suit of the plaintiff as executrix. In the case of the first process after the death of the testator, they might traverse that matter, and therefore it may be necessary to be shewn; but in this case they are too late to object any thing of that nature, and I submit this as a good answer upon that distinction.

The court at first doubted upon the point of its being shewn for cause of demurrer, but said afterwards there was nothing in the objection, and gave judgment for the plaintiff.

On error in
Parliament
the judgment
was affirmed.

There was another exception that the sheriff had returned, that the wife as well as the husband had converted to her own use; but this was over-ruled on the authority of *Bellew v. Scott*, ante 440.

Writ of error
sued out be-
fore judgment
is a *superfedeas*.

The judgment was pronounced about one of the clock, and the plaintiff sent immediately and put an officer into possession of the defendant's goods, who had before sued out a writ of error; and it stood equal before the court as to the point of time, whether the execution was first served, or the writ of error first allowed. The court set aside the execution, saying, that though not being served with the allowance it was no contempt, yet in point of law it was a *superfedeas* from the moment of pronouncing judgment.

39 Hen. 6.
50. a.

Bourne *vers.* Turner.

Practice.

SERJEANT Comyns moved on affidavit, that the tenant in possession was a material witness for the landlord, that therefore the landlord might be made a defendant in the room of the tenant in possession.

Strange contra insisted it was never done, and it would not make him a witness when done. *Et per curiam*, He is liable for the *mesne* profits. The declaration is regularly delivered to the tenant in possession

possession: it was never done in this court, though Serjeant *Comyns* said it had been done in *C. B.*

Clark *vers.* Godfrey. In *C. B.*

IT was settled by the court on great consultation, and delivered in a solemn resolution by *Eyre* Chief Justice, that an attorney's bill must be delivered, on the 3 *Jac.* 1. c. 7. before any action brought; that so the client may have an opportunity of looking into it, before he is run to any farther expence. 2 *Geo.* 2. c. 23. §. 22.

Practice in delivering attorneys bills.

Shank *qui tam vers.* Payne.

In *Middlesex*, coram *Raymond*, Chief Justice.

IN a *qui tam* on the statute of usury, the Chief Justice refused to let the party to the contract be a witness to prove the re-payment of the money, because till that was proved he was no witness at all. *Strange pro defendente.*

Party to usurious contract cannot be called to prove payment.

Dominus Rex vers. Azire. *Ibidem.*

ON indictment against the husband for an assault upon the wife, the Chief Justice allowed her to be a good witness for the King, and cited Lord *Audley's* case, *State Trials*, vol. 1.

Wife witness against husband.

Dominus Rex vers. Fletcher. *Ibidem.*

TWO were indicted for an assault, one submitted and was fined 1 s. and paid it: the other pleaded Not guilty, and upon the trial the Chief Justice allowed him to call the other defendant, the matter being now at an end as to him.

Where one defendant is fined, he is a witness for the other.

Anonymous. In *C. B.*

TRESPASS *quare clausum fregit et quendam taurum personae ignotae fugavit, per quod* the plaintiff's goosberry bushes were thrown down, *necnon quinque perticas, anglice poles, in eodem clauso erectas, affixatas et existentes fregit, laceravit et spoliavit:* verdict for the plaintiff, and a shilling damages. And on motion for full costs the court held, that the words in this declaration did

Where no more costs than damages.

not import an actual asportation, which must be an entire carrying away; and that the tearing and pulling up the poles was not such an asportation: that this was a case in which a certificate might have been made, because the freehold might have been in question. In debating this case, 2 *Vent.* 48. was cited, which was trespass *quare clausum fregit*, and putting stakes upon his ground, where it was held, that the plaintiff should not have full costs, but if any thing had been taken away, of how little value soever, it had been otherwise. The court did not seem satisfied with the case in 2 *Ven.* 215. which was trespass *quare clausum fregit*, and digging up and carrying away his trees; wherein it appeared upon the evidence, that the defendant had digged up several roots of the plaintiff's trees, and removed them to a place upon the same ground about two yards distance off; and upon a question whether this was such a carrying away as that the plaintiff should have full costs, or only costs according to the statute, *Pollexfen and Rokeby* were of opinion, that the plaintiff was to have full costs, because the roots were carried from the place where they were digged, though not removed off from the ground; but *Ventris* thought that it was not such a taking as amounted to an asportation; and to support this opinion they relied on the case of *Franklin v. Jolland*, *Hil.* 8 *W.* 3. in *B. R.* which was trespass for breaking and entering the plaintiff's close, and eating his herbs, and for pulling up and throwing down three perches of hedge lately erected; and on a verdict for the plaintiff and 5 s. damages, he moved for costs notwithstanding the 22 & 23 *Car.* 2. because there was an asportation laid in the declaration, *viz.* pulling up and throwing down the hedge, which could not be done without some asportation. But *per Holt et Curiam*, By asportation is meant a carrying quite away, and not such an asportation as this; so the motion was denied.

Reynolds *vers.* Clarke.

Trin. 8 Geo. rot. 474.

Where it
must be tref-
pass, and
where case.
Ld. Raym.
1399.

TRESPASS for entering the plaintiff's yard, and fixing a spout there, *per quod* the water came into the yard and rotted the walls of the plaintiff's house. The defendant justifies, that before the trespass *John Fountain* was seised in fee of the plaintiff's house and yard, and two other houses adjoining, and demised the plaintiff's house and yard to one *Tyler*, except the free use of the yard and privy for the tenants of the other two houses jointly with the tenant of the plaintiff's house: then he shews how the house of the defendant, which was one of the two houses, came to him, and that

that he entered the yard and fixed the spout for his necessary use, to carry off the rain, *prout ei bene licuit*. The plaintiff demurs. And

Reeve pro defendente insisted, that this exception amounted to a licence of the party, and that a distinction has always been taken between a licence in law, as to go into a tavern, and the licence of the party, and that this being of the latter sort an action of trespass will not lie; but if the spout be a prejudice, the plaintiff must right himself by an action upon the case. 11 Co. *The six Carpenters case*. This is an action of trespass brought for a nuisance upon our own possession.

Et per Chief Justice, Though he had a right to enter into the yard, yet it is considerable, whether if he abuses that right to the detriment to another, he is not in the same case with every other trespasser. *Et per Fortescue* Justice, Trespass is a possessory action, and how does this invade the plaintiff's possession? The difference between trespass and case is, that in trespass the plaintiff complains of an immediate wrong, and in case, of a wrong that is the consequence of another act. *Et per Raymond* Justice, That distinction is perfectly right. I remember a case in *B. R. Courtney v. Collett*, Ld. Raym; 272. which was for the defendant's diverting his own water-course in his own land, *per quod* the plaintiff's land was overflowed; after a verdict *pro quer*, it was often debated, whether this was an action of trespass, or upon the case, and at last judgment was for the plaintiff, who had brought trespass only.

The court said it was a nice case, and therefore they gave not their opinion, but ordered an *ulterius concilium*.

After a second argument to the effect of the former, the court delivered their opinions this term. Chief Justice: We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion: if the act in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful (as it was in this case) and the prejudice to another is not immediate, but consequential, it must be an action upon the case; and this is the distinction. The case I mentioned the last time of *Courtney v. Collett* was a plain trespass, and the account I then gave of it from my memory was mistaken: it was *Hil. 9 W. 3.* in *B. R.* trespass for taking fishes, *necnon pro eo quod* he broke down the bank of the river, *per quod* the water issued and other fishes went away: after verdict for the plaintiff, it was moved in arrest of judgment, that the latter part was case, and not joinable with trespass; but the court held that was a trespass, and what came under the *per quod* was only matter of aggravation. There was another case in *B. R. Hil. 8 Ann. Leveridge v. Hoskins*.
That

That was case for digging trenches, whereby the water was drawn away from the plaintiff's river; it was moved in arrest of judgment, that this was trespass; but the court said, that it not being laid to be a digging upon the plaintiff's ground, the action upon the case was most proper: and I take that and this to be the same case, the defendant having a right to enter the yard, and do the first act, which is here complained of, I think this should have been an action upon the case, and that trespass will not lie.

Powys accord. *Et per Fortescue* Justice, Trespass will not lie for procuring another to beat me; if a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all. *Et per Reynolds* Justice, The distinction is certainly right; this is only injurious in its consequence, for it is not pretended that the bare fixing a spout was a cause of action, without the falling of any water; the right of action did not accrue till the water actually descended, and therefore this should have been an action upon the case. *Per curiam*, Judgment for the defendant.

Michaelmas

Michaelmas Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } Justices.

James Reynolds, Esquire,

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Wyat vers. Effington.

TRESPASS for entring the plaintiff's house, and taking *Taking bona diversa bona et cattalla ipsius Sarae adtunc et ibidem inventa* : after verdict for the plaintiff, it was moved in arrest of judgment, that this was too general, 5 Co. 35. And without much debate the court were all of opinion, that this was not maintainable, and so the judgment was arrested. *et catalla is too general in trespass. Ld. Raym. 1410.*

Dominus Rex vers. Sir William Lowther.

THE court refused to grant an information in nature of a *quo warranto* against Sir William Lowther for erecting a warren, it being only of a private nature. And Fortescue Justice said, he knew it formerly attempted and denied. *No information for erecting a warren. Ld. Raym. 1409.*

Smith *vers.* Key.

Practice.

IN a *quantum meruit* the defendant pleaded a tender on the 4th of May, *ante diem exhibitionis billae*: the plaintiff replied, *non obtulit ante diem*, &c. and to oust the defendant of the benefit of the plea, made up the book with a general *memorandum*, that would refer to the first day of the term, which was before the 4th of May. I moved on an affidavit that the tender was upon the 4th, and no writ taken out till the 6th of May, that the plaintiff might be obliged to make his *memorandum* special, according to the truth of the fact: and after a rule to shew cause, the same was ordered accordingly.

Pocklington *vers.* Peck.

Where a
scire facias
is abated by
a plea, there
shall be no
costs.

ERROR was brought of a judgment in *C. B.* in an action there by a *feme* sole: to the *scire facias quare executio non*, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the *scire facias*. Upon this *Reeve* moved on behalf of the defendant in error, to quash their own *scire facias*; and *Strange contra* insisted upon costs. *Sed per curiam*, It is the same in a *scire facias* as in an action, where you plead in abatement and the plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we should have made him pay costs. The writ was quashed without costs.

Pether et al' *vers.* Shelton.

On tender
pleaded, the
money must
be paid into
court, or the
plaintiff shall
take judgment.

THE defendant pleaded a tender with a *profert in curia* of the money; and on a certificate that no money was paid in, *Strange* moved to set aside the plea. *Et per curiam*, It is no plea, and the plaintiff might sign judgment.

N. B. I did not venture to advise my client to do this, because in another case this term, where a plea in abatement was put in without *affidavit*, and the plaintiff signed judgment; the court set it aside.

Flower *vers.* Comit' Bolingbroke.

ABOUT twenty years since the plaintiff obtained judgment against the then Earl of *Bolingbroke*, but by the carelessness of his attorney it was never entered up, though he had charged the plaintiff for doing it, and had been paid his bill. The attorney being dead, whereby the plaintiff had lost his remedy against him, and there being a decree in Chancery for the payment of these debts in a course of administration; the plaintiff to have a preference before other creditors, moved the court for leave to enter up the judgment *nunc pro tunc*. But upon consideration the court refused to do it, (though by not being docketed it could not affect purchasers) it being at such a distance of time, that the presumption was, that the debt was satisfied.

The court will not give leave to enter up a judgment of twenty years standing *nunc pro tunc*.

Sherman *vers.* Alvarez.

ACTION by original in *B. R.* The defendant on *oyer* pleaded in abatement, that the writ was never returned: and it was moved by *Fazakerley*, to set the plea aside, because there was not an affidavit to verify it; for the intent of the act was, that the plaintiff should not be delayed by being obliged to take issue, unless when the plea came in there was some cause to believe the truth of it.

Affidavit to plea in abatement where necessary. L. Raym. 1409.

Lee contra, observed that the act did not confine the affirmance of the plea to the oath of the party, but to *any other probable cause*; and what can be more probable that this writ was never returned, than when the plaintiff in giving *oyer* of it has not set it out. *Sed per curiam*, When you demand *oyer*, it is only *oyer* of the writ: whether it be returned or not is a matter of fact, wherein the plea not being verified by *affidavit*, it must be set aside.

The Company of Mercers and Ironmongers of Chester
against Bowker.

ERROR of a judgment in the grand sessions of *Chester*, whereby a judgment given in the mayor's court of *Chester* was reversed for an error in fact: the error assigned and found on record was, that the action was properly commenced and tried before a mayor who was no party; but that after the verdict, and before the judgment, one of the company of mercers was chosen mayor, and gave judgment

In actions before a mayor he must not appear to be a person interested.

judgment for the plaintiffs. The court of grand sessions reversed the judgment, and upon error in *B. R.* it was argued by *Reeve*, that the verdict being before a right person, the judgment thereupon which was but matter of form, might be well enough. 2 *H. 4.* 4. *Bro. Err.* 32. *Parol remand.* 2. *Cro. Eliz.* 320.

Fazakerley contra. The defendant had no opportunity in the court below to be relieved, it being after the verdict. *Pearson v. Parkins*, *Hil.* 3 *Geo.* The judgment is the only material part; for as to the verdict, that is given by the jury, and there being a judgment for damages to the plaintiffs, this man was interested, and therefore could not be a judge.

Et per curiam, This was very properly assigned as error in fact, and that was the first opportunity the defendant had to take advantage of this matter: he had no day in court, either to admit or deny the jurisdiction: he could only move in arrest of judgment, had it been a fact appearing upon the record, as it was not. My Lord *Hobart* carries it so far as to say, that an act of Parliament to make a man judge in his own cause would be void: if the defendant could have been admitted to suggest this matter below, must it not have been tried, and been tried before this man? The judgment of reversal in the grand sessions must be affirmed.

Parker vers. Thoroton.

One challenged sworn as a talesman, ill.
L. Raym.
1410.

A Juror on the principal pannel was challenged, and afterwards sworn on the *tales* by a wrong name, and though no fault was found with the verdict, yet the court granted a new trial.

Pees vers. Major', &c. Leeds.

Mandamus to restore must be directed only to the body that had power to a-move.

UPON the return of a *mandamus* it appeared, that the power of amotion is in the mayor, aldermen *et al' de communi concilio*: and it was moved by Serjeant *Pengelly* in arrest of judgment, that the writ was directed to the mayor, aldermen and common council, which infers that the mayor and aldermen are no part of the common council, for want of the word *al'*, which is in the power of amotion. *Et per curiam*, The writ should be directed to the body who are to do the act: here is no body in this direction but who must join in the act; this is only repeating the several constituent parts of the corporation, and the mentioning the intire common council, after the mayor and aldermen, is but a repetition *quoad* the mayor and aldermen. The writ is well enough, and there must be a peremptory *mandamus*. The

The case of the bail of Boise and Sellers.

BOISE and Sellers were brought up by *habeas corpus* from Winchester gaol, and were returned with two civil suits, and several Exchequer informations for frauds in the customs. It was moved on behalf of the bail in the civil actions, that they might be at liberty to surrender according to 25 E. 3. c. 19. To which it was answered by the Attorney General, that the King had a prerogative to hold his debtor in what lawful gaol he pleased, (*Salk. tit. habeas corpus*). However the court would never turn them over, till they were satisfied as to the reality of the debts, and its being an application by the bail: whereupon a reference was made to the master, and it appearing the next day on his report, that the civil actions were for just debts, and actually brought before any of the crown's informations, they were turned over to the marshal upon the surrender of the bail.

The King's debtor may be brought up and surrendered in a civil suit.

Hatton *vers.* Ifemonger.

Intr. Trin. 11 Geo. rot. 324.

IN an action upon several promises the defendant pleaded a foreign attachment, and lays the custom to be, that the plaintiff shall swear his debt; but in setting out the case upon the attachment pleaded, he did not shew any oath. And upon a general demurrer the court held it a fatal exception, the defendant not having pursued his own custom. *Lat. 208. Cro. El. 713. Trin. 7 Geo. Flewster v. Hackshaw*, the same case. *Judicium pro quer'.*

Foreign attachment how to be pleaded.

Cooper *vers.* Spencer.

AFTER verdict for the plaintiff *Strange* moved in arrest of judgment, that it was an action of assault and battery, to which the defendant had pleaded *son assault*, and the plaintiff had replied *de injuria sua propria*, concluding to the country; and without any *similiter* on the part of the defendant, had carried the cause down to trial.

Want of a *similiter* not aided, or amendable.

Serjeant *Girdler e contra* would have maintained it, because there was an issue joined upon the *vi et armis*. To which it was answered, that that had been held to be immaterial, *Stratford v. Neale*. And the court inclining to arrest the judgment, the Serjeant at another day

day moved for leave to amend, and cited many cases to prove that a *similiter* was but form, and amendments on misjoining of issues were infinite. *Cro. Jac.* 502, 67. *Fitzb. Amendment* 32. 8 Co. 161. b. *Dy.* 160. 1 *Roll. Abr.* 200. *Cro. El.* 435, 752. 2 *Roll. Rep.* 59.

Strange contra, admitted a misjoinder of the issue would be helped, the 32 *H.* 8. c. 30. expressly mentioning it; but the objection here was not matter of form, for the defendant was not obliged to join issue, he might demur; and in many cases the replication of *de injuria propria* was demurrable to: that it not being pretended the issue book was right, there was nothing to amend it by.

The court were all of opinion that it was a fatal objection, and not amendable; so the judgment was arrested.

Dominus Rex *vers.* Minify et al'.

On motion to submit to a fine, affidavits read denying the fact.

THE defendants were returned rescuers on *mesne* process, and upon motion to submit to a fine the court said, they must take the return to be true: but they permitted the defendants in mitigation of the fine to shew that in fact there was no actual arrest, it being in the night; and the court only fined them 1 s. a-piece. They said that anciently there was a settled fine for rescuers, but of late the courts had fined according to their discretion, upon considering the circumstances of the case.

Hale *vers.* Cove.

Where the jury drew lots, the court set aside the verdict though it was according to evidence.

THE jury having sat up all night, agreed in the morning to put two papers into a hat, mark'd *P.* and *D.* and so draw lots; *P.* came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the Judge.

Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence: but at last it was agreed that the costs should wait the event of the new trial.

Suell *vers.* Timbrell.

ON a motion for a new trial, it was held, that desiring a juror to appear in his cause, which was between a miller and a baker, was no ground to set aside the verdict. And the court remembered the case of the Duke of *Leeds*, who wrote a letter to a juror, desiring him to attend, and you will oblige your humble servant, *Leeds*; which was thought no reason to set the verdict aside.

What is not
labouring a
juror.

Haley *vers.* Fitzgerrald.

IN debt upon a bail bond, it was objected on demurrer, that the plaintiff had not shewn, that the defendant in the original action was arrested, and the act for amendment of the law confines the assignment of a bail bond to such actions wherein the party is arrested. *Et per curiam*, The words of the act are so, but we must give them a liberal construction: after mentioning an arrest, it goes on and says, *the person against whom such process is taken out*, which are general enough to take in this case. It would be of mischievous consequence, if a bail bond taken civilly, without exposing the party by an arrest, should not be as effectual as if there had been an actual arrest: and *Fortescue J.* remembered the case of *Watkins v. Parry*, *Trin. 7 Geo.* where the court for this reason refused to let the defendant traverse the arrest. The plaintiff had judgment.

In actions up-
on bail bonds
need not shew
an arrest.

Ante 444.

Gore *vers.* Goston.

UPON an execution against the defendant the court was moved on behalf of *Sadler* the defendant's landlord, for a rule on the sheriff to levy and pay him a year's rent; and the question came upon this, whether the sheriff was to have his poundage, and from whom. After several motions the court made a rule for him to pay the landlord without any deduction. They inclined that this was in the nature of a farther execution, and that the sheriff was intitled to his poundage, but from whom they gave no opinion, it not being before them as to any thing but the case of the landlord. *Strange pro Sadler*, the landlord. 8 *Ann. c. 17.*

On execution
the landlord's
rent shall be
paid without
deduction.

Dominus Rex *vers.* Johnson.

Trial at bar
ordered in a
misdemeanor.

Ante 52.

AN information was exhibited by order of *B. R.* against the defendant for neglects and abuses in his office of justice of the peace in relation to deer-stealers; and it was moved on behalf of the crown, on affidavit of the defendant's having 700 *l. per annum*, and there being above thirty witnesses for the prosecutor, that it might be tried at the bar: and the case of *Regina v. Wakefield*, the town clerk of *Litchfield*, who fixed up a paper reflecting upon a jury, which was tried at the bar, was mentioned; and also the case of auditor *Harley*, where the matter in dispute was a trifle, but like to be of long examination; upon which authorities the court granted a trial at bar in this case. Mr. Attorney said, had it been an information exhibited by him, he would have had a right to bring it to the bar if he had thought fit. *N. B.* The defendant was convicted and fined 400 *l.* and committed till paid.

Dominus Rex *vers.* Warne.

Bastard
chargeable
only where
born.

INDICTMENT for taking a bastard child born out of the parish of *A.* and bringing it into that parish, and there keeping it privately without notice to the churchwardens, and with intent to charge the parish. The court quashed the indictment, because it appeared, the parish could not be burthened, the bastard being born out of the parish of *A.*

Obrian *vers.* Frazier.

Scire facias
may be served
immediately
before the re-
turn is out.

MR. *Ketelbey* moved to stay proceedings on a *scire facias*, because it was not served till the day before the return. *Sed per curiam*, If it lay four days in the office, that is all which is required: the summons may be made any time before the court is up on the day of the return.

Trin. 4 Geo. 2. Bland v. Perry, it was so ruled again, on great debate. *Strange pro quer'*. And *Mich. 4 Geo. 2. Williams v. Mason*, it was ruled that it must lie four days in the office, as well where a *scire feci* is returned, as a *nichil*.

Gibson *vers.* Hudson's Bay Company.

In Canc. Assisten' Raymond et Price.

THE plaintiff as assignee of the effects of Sir *Stephen Evance* a bankrupt, brings his bill against the company, to oblige them to suffer him to transfer stock. The company insist, that Sir *Stephen Evance* was their banker, and greatly indebted to them, and that upon the clause in the bankrupts act, which directs the commissioners to state the account between mutual dealers, they shall be allowed to hold the stock, and account only for the ballance, if any shall appear against them. And of this opinion was the court, and decreed accordingly. 2.

Stock a pledge to the company. N. B. In the quotation of this case in Abr. Eq. Ca. 9. it is stated that there was a by-law which subjected every member's

stock to his debts to the company, on which the decree was founded. But the general doctrine was exploded.

Carter *vers.* Fish. In B. R.

DEclaration for words, and then it goes on *quorum quidem fallorum verborum propalationis praetextu idem Carolus non solum in bonis, nomine, et in negotiis suis honestis, multipliciter laesus et deterioratus existit, verum etiam occasione verborum praedictorum, per procurationem* of the defendant he was taken up and carried before a justice (the words charging him with stealing a hen). There was a verdict for the plaintiff and 1 s. damages; and it was moved the last term for full costs, and *Salk.* 206. *Cro. Car.* 140. *Salk.* 642. *Cro. Car.* 163, 307. were cited: and this term the Chief Justice delivered the opinion of the court, that the plaintiff should have full costs, because this was not laid as an aggravation, but as a distinct fact; he spoke the words, and he procured him to be carried before a justice.

Where no more costs than damages.

L. Raym. 1589.

Blunt *vers.* Mither. In C. B.

TRESPASS for breaking and entering the plaintiff's house, and keeping the plaintiff out of the use of the house, with a *continuando* for a month, whereby the plaintiff was put to great expences to regain the possession, and in the mean time lost the profit and use of it: there was a verdict *pro quer'* and 2 s. 6 d. damages. And upon motion for full costs, they were denied by the court, for this is a plain trespass, *quare clausum fregit*, and the *per quod* is only aggravation; and in this case the title to the freehold

Where no more costs than damages.

might have come in question, and if so there should have been a certificate of the Judge, which not being in this case, the plaintiff can have no more costs than damages.

Shelling *vers.* Farmer.

At Guildhall coram Eyre C. J. de C. B.

fee comp. 8100.

Seizing an
house in the
East-Indies is
not triable
here.

*fee contra
comp. 180.
accord.
A. pump.
stat 503.*

IN an action of trespass and imprisonment for facts done in the *East-Indies*, the plaintiff laid them all (being transitory) in London, and *inter alia* declared for seizing the plaintiff's house situate *apud London praed' in parochia et warda praed'*. It was objected *pro def'* that the trespass as to the house was local, and they could not give evidence of seizing a house in the *East-Indies*. And Eyre C. J. refused to let the plaintiff give evidence as to the house, comparing it to the case of rent for a house at *Barbados*, where it has been held you may bring covenant for the rent in *England*, but an action of debt, which is local, cannot be brought here.

In the course of the evidence it appeared, the action was brought against the defendant for an imprisonment by him as governor of a factory in the *East-Indies*: and for his defence he alleged, that he had orders from the company so to do, and appealed to the company's books of letters, &c. which he desired might be produced.

*East-India
company not
obliged to
produce book
of letters, &c.*

*fee 8. Term
Rep. 609.*

I attended on behalf of the company, to desire to be excused, alleging that these were not of the nature of publick books, which every body has a right to have access to, and of which copies are evidence; whereas these related only to the private transactions of the company: and it might be of mischievous consequence, if in every action wherein the company is not concerned, they should be obliged to lay open the secrets of their trade, and disclose to all the world a whole series of letters and correspondence between them and their agents: however we had the books and papers there, and submitted to the directions of the court.

The Chief Justice said he would not oblige the company to produce them, and so left us to our liberty; whereupon we refused to produce them, and they were carried back again to the *India* house. The action was against the defendant as deputy governor: and on Not guilty he gave in evidence a release given by the plaintiff to the *East-India* company in pursuance of an award, whereby reciting he had sustained several injuries by the company's agents, particularly the deputy governor, therefore they award him 1000*l.* and order him to give a general release. The defendant being no party

party to that release, could not plead it, but the Chief Justice allowed him to give it in evidence in mitigation of damages; and these not being private papers, I consented on behalf of the company that they should be produced.

The plaintiff in reply would have called the arbitrators, to prove that they refused to take into consideration the occasion of this action, which was for the private personal wrong: but the award and release having general words sufficient to take in all, the Chief Justice would not suffer any evidence to be given to contradict the award; so the jury found for the plaintiff (as they could not help doing, the defendant having pleaded *Non cul'*) and gave him a shilling damages.

Where an award is made to take in all matters, shall not be admitted to shew any thing was not taken into consideration.

Morris vers. Martin.

At Guildhall, coram Raymond, Chief Justice.

ACTION for meat, &c. provided for defendant's wife. The defendant proved she went away from him with an adulterer: and the Chief Justice held, that the husband should not be charged for necessaries for her, though the plaintiff who provided for her had no notice; and he said, Chief Justice *Holt* always ruled it so. And he put the case of an apothecary who took a sick woman into his house, being the wife of a country gentleman, from whom she had gone away with an adulterer. So my client the plaintiff was nonsuit.

Where a wife goes away with an adulterer, the husband cannot be charged for necessaries. *Mich. 8 W. 3. Todd v. Stoakes, at Guildhall.*

Martin et al' vers. Horrell. Ibidem.

THE plaintiffs were goldsmiths, and one *Stone* their apprentice over-paid a bill 10 *l.* and in an action for money had and received to the plaintiff's use, the Chief Justice allowed *Stone* to be a witness; though it was objected, that unless the money was recovered back from the defendant, *Stone* would be answerable to the plaintiffs. But the Chief Justice said, he did it *ex necessitate* of the thing, and it would be of mischievous consequence, if in transactions of this nature a goldsmith's servant should not be a witness. So the plaintiffs recovered the 10 *l.*

Goldsmith's servant who over-pays money is a witness in action for it again.

Weaver *vers.* Boroughs. Ibidem.

Where there is a special agreement the plaintiff cannot go upon a general *indebitatus assumpsit*.

THE plaintiff declared on a special agreement for the hire of a horse at 2 s. 6 d. *per diem*, and to keep him so many days, and return him safe at the end of the time. There was likewise an *indebitatus assumpsit* for the hire. And on the trial the plaintiff could not prove the special agreement in the manner he had laid it, and therefore his counsel would have had recourse to the *indebitatus assumpsit* to recover only the hire: but the Chief Justice was of opinion, that the agreement for 2 s. 6 d. *per diem* being laid as part of the special agreement, which was not proved, he could not let them separate that clause, and recover for the hire, as they might have done on a general *indebitatus assumpsit*; it not being a debt, unless the agreement had been proved. And he put the case of a contract for goods at a certain price, where the plaintiff is never suffered to recover upon the *quantum meruit*. So the plaintiff was called.

Wilkinson *vers.* Lutwidge. Ibidem.

In action against acceptor of bill need not prove the hand of drawer.

CASE upon a bill of exchange against the acceptor. And it was objected, that we should not be admitted to prove the acceptance, until we had proved the hand of the drawer. And a difference was taken between this case, and the case of an action against the indorser, who is liable though the bill be not signed by the person who is supposed to draw it; because an indorser is in the nature of a new drawer, whereas an acceptor is not liable, unless the bill was fairly signed by the drawer. But as to this the Chief Justice was of opinion, that the proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent: but he said it would not be conclusive evidence, and therefore if the defendant could shew the contrary, the reading the bill on behalf of the plaintiff should not preclude him.

What amounts to an acceptance of a bill of exchange.

Whereupon the bill was read, and the question came upon the validity of the acceptance: as to which the case was this: The bill was drawn from *New England* for a sum of money advanced there, to fit out a ship that had put in there, after having been taken by pirates. The bill was drawn upon the defendant, who was the freighter, and he living at *Whitehaven*, the plaintiff applied to a merchant in *London*, who was his correspondent, to get him to send this bill and another of 150 l. drawn by the same person, and on

the

the same account. He sent both bills inclosed to the defendant, who by letter acknowledged the receipt of them, and writes thus: "The two bills of exchange, which you sent me, I will pay them in case the owners of the *Queen Anne* do not; and they living in *Dublin*, must first apply to them; I hope to have their answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do; which I request you will acquaint Mr. *Wilkinson* with, and that he may rest satisfied of the payment." In another letter he writes, "I have not had an opportunity of sending the bills you sent me, to the owners of the *Queen Anne* to *Ireland*, but will take the first opportunity, and then shall remit to the gentleman concerned, according to my promise."

The defendant upon this paid the 150 *l.* bill; but in this action insisted, that it did not amount to an acceptance, being only conditional, to pay it in case the owners of the *Queen Anne* did not; and his promise to procure it from them was in favour of the plaintiff. But the Chief Justice was of opinion, that it was rather in favour of himself, and he having undertaken to write to them, it was not incumbent on the plaintiff to shew any application to them; and as to the acceptance, it was in his opinion a very strong one; the bill was presented to the defendant; says he, This is a good bill, and I will pay it: you need not protest it, for it shall be paid; I only desire, that for my convenience you would stay till I can write to the owners in *Ireland*, who I do not expect will do any thing in it: this will be of service to me; and as to you, you shall be secured, for I promise you shall have the money in all events.

The bill being payable thirty days after sight, the jury gave us interest from thirty days after the date of the first letter, which acknowledged the receipt of the bill. Interest given from the time of acceptance.

Syderbottom *vers.* Smith.

Coram Eyre Chief Justice de C. B. in Middlesex.

IN an action against the indorser of a promissory note; the Chief Justice directed the jury, to find for the defendant, because the plaintiff had not proved diligence to get the money of the drawer: being of the old opinion, that the indorser only warrants upon the default of the drawer. 2. In action against indorser must prove demand on drawer. Vide Salk. tit. Bill, &c.

Norcott *vers.* Orcott. Ibidem.

A creditor allowed to prove debtor not intitled to his discharge on the *Mint* act.
Ante 507.

THE defendant pleaded the *Mint* act; and the issue to be tried was, whether he was a shelterer within the *Mint* on the 11th of February 1722. To prove him at large at that time, the plaintiff called several of the creditors; and it was objected, that they were not good witnesses to prove it, being interested in the event of the question: and I cited the case of *Shuttleworth v. Bravo*, where on an issue out of Chancery to try whether a bankrupt had forfeited the allowance out of his estate by gaming contrary to the act, it was refused to let any of the creditors be sworn to prove a gaming, because that was swearing to increase their own dividend.

The Chief Justice allowed that case, but said that affected all the creditors, whereas here the plaintiff only was at present concerned. He said it would go to their credit, but not to their competency; so they were sworn.

Powell *vers.* Hord, vic' Oxon'.

Coram Raymond, Chief Justice, in Middlesex.

Sheriff's bailiff no witness to prove attempt to arrest.
Ld. Raym. 1411.

ACTION for false return of *non est inventus* on *mesne process*. And the Chief Justice refused to let the defendant prove by the bailiff who had the warrant, that he had endeavoured to execute it, because he had given security, so that it was his own cause in effect.

In action for false return on *mesne process* the jury may give the whole debt in damages.

The sheriff not being able to excuse the return; it was attempted to mitigate the damages, by shewing that the defendant was still visible, and it being only *mesne process*, the debt was not lost, and the measure of damages should be only the expence of the process. The Chief Justice in his direction inclined to give the plaintiff the whole debt of 43 l. (it being an action of debt on a judgment) because there was but a possibility of the plaintiff's recovering against the original defendant. He said it would depend on circumstances, and if the defendant had been a man of estate, and so no danger; he should think the debt would be too much to give: but that not being this case, the jury found the whole debt in damages, with the opinion of the Chief Justice. And afterwards the defendant moved for a new trial; and upon the Chief Justice's stating the case, as it appeared upon the evidence, the whole court were of opinion, the

Chief

Chief Justice had done right, in refusing the bailiff to be a witness; and that as to the point of damages the verdict was right, and there ought to be no new trial.

Stone *vers.* Lingwood.

At Guildhall, coram Eyre.

THE plaintiff was captain of a ship, and the defendant owner: the plaintiff brought over a small parcel of elephants teeth on his own account, and a large parcel for the defendant, who entered the whole at the *Custom-house*, paid the duty, and had the whole delivered out to him; and not re-delivering to the captain his parcel, an action of trover was brought. And it was insisted for the defendant, that the plaintiff should shew a tender of the duty, otherwise the goods were in the nature of a pledge, and he was not bound to deliver them: but the Chief Justice said, that would not justify the defendant in keeping them, for he had his action for the money; and if he would shew what the duty came to, it might be deducted in damages. Which was done accordingly.

In trover the defendant cannot justify detaining goods till money laid out upon them is paid.

Ryley *vers.* Hicks.

In Middlesex, coram Raymond, Chief Justice.

THE plaintiff declares, that 24 February 1723. she demised to the defendant a chamber, a cellar, and half a shop, *habendum* from *Lady-day* then next for a quarter of a year, and so from quarter to quarter, so long as both parties shall please, at 5 *l.* per quarter.

Leases by parol to commence at a future day, are good.

It was objected by *Whitaker*, that this being to commence at a future day, was but a lease at will since the statute of frauds. The Chief Justice at first thought it a good objection, but upon farther consideration he was of opinion, that the exception was not confined to leases that were to commence from the time of making, but was general as to all leases that were not to hold for above three years from the making. So the plaintiff had a verdict. *Strange pro quer.*

Titus *vers.* The Lady Preston.

At Guildhall, coram Gilbert, *Chief Baron*.

Change alley
computation
is to be taken
by calendar
months.

DE B T on bond: the defendant pleaded, that the money was lent from 24 *August* to 24 *May*, for a premium of 150 Guineas. And on evidence it appeared, the bargain was for nine months. It was objected, *pro quer*, to be a variance, because months must be taken to be lunar, and not calendar, and then it does not come so far as the 24th of *May*. But the Chief Baron thought it well enough, the general understanding being of calendar months in cases of this nature. So the defendant had a verdict. *Strange pro defendente*.

Moreland *vers.* Bennett.

In Middlesex, coram Raymond, *Chief Justice*.

If any interest
was paid upon
an old bond
after the day,
it must be a
plea upon the
statute.

TO a bond of thirty years standing, the defendant pleaded *solvit ad diem*, and relied upon the presumption: the plaintiff in answer could only prove payment of interest two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years past. The Chief Justice was of opinion, that this plea of payment at the day, was to be taken as strictly in this case, which went only upon the presumption, as in any other case; and the plaintiff having falsified the plea, by shewing a payment of interest two years after, it was not enough to say the other twenty-eight years were enough to let in the presumption; because to take advantage of that, the defendant should have pleaded upon the act for amendment of the law, that he paid the money after the day, in which case it would have been with him upon this evidence.

Dominus Rex *vers.* Fox. Ibidem.

Laying a wa-
ger doth not
incapacitate
for a witness.
3 Lev. 152.
2 Mod. Caf.
31.

ON an indictment for an assault, it was proved, that the prosecutor had laid a wager, that he should convict the defendant. And the Chief Justice held him to be a good witness for the King, though it might go to his credit.

Fowler *vers.* Sir Thomas Samwell.

At Guildhall coram Raymond C. J.

FOWLER being the surviving partner of *Niccols*, brought an action upon the following note, and likewise declared on an *indebitatus assumpsit*, "Received and borrowed of *Richard Niccols* and co. 4500 l. which I promise to repay with interest, on his transferring to me or order 550 l. *South-sea* stock." The tender of stock was proved to be after the death of *Niccols*. And the Chief Justice was of opinion, that it being tied up to a tender by *Niccols* (who had time during life, if not hastened by request) no tender after his death could make this an absolute debt recoverable upon an *indebitatus assumpsit*: but the plaintiff must go upon the special count. *Strange pro quer*'.

Where a debt is to arise upon a condition subsequent, there must be an exact performance to intitle the plaintiff to recover on a general *indebitatus assumpsit*.

Grammer et al' *vers.* Nixon.

At Guildhall coram Eyre C. J.

A Goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value *per* ounce with an essay then shewn. Upon the evidence it appeared he had forged the essay, and that the ingot was made out of a lodger's plate, which he had stolen. And the Chief Justice held the master was answerable in this case. *Strange pro def*'.

Master liable for fraud of apprentice.

Burnaby's case.

In Canc. coram Domino King.

TOMS and *Allen* having recovered judgment against him, he was surrendered by his bail, and then charged in execution; after which the plaintiffs in that action prefer their petition to the Lord Chancellor, as creditors, for a commission of bankruptcy, which issued; but was superseded upon the bankrupt's petition, the Chancellor being of opinion, that the body of the debtor being in execution, it was a satisfaction of the debt in point of law, so that they were not creditors, who could petition. *Strange pro creditoribus*.

He who has the body in execution cannot be a petitioning creditor.

See acc. P. 123.

The Duke of Somerset *vers.* France et al'.

Tenant for life by a marriage settlement of a manor, is intitled to a general fine from the customary tenants of that manor, upon the death of the last admitting lord.

General fine.

For the meaning of the word *gressum*, vide *Rastal's Terms of the Law. Spelm. Gloss. 263, 269.*

Dropping fines.

UPON the death of her grace the Duchess of Somerset, the Duke her husband claimed a general fine of the several customary tenants of the several manors of *Cockermouth, &c.* in the county of *Cumberland*, which were the inheritance of the Duchess. And the Duke having assessed their fines, and the tenants having refused to pay them, the Duke brought his bill in the court of Chancery, to establish his right to these fines, as next admitting lord.

The bill set forth that *Jocelyn* Earl of *Northumberland* was seised of the said manors in fee, and that upon his death they descended to his daughter and heir the lady *Elizabeth*, who afterwards was married to the Duke of *Somerset*, and that upon such marriage she levied a fine of the said manors, to the use of herself for life, remainder to the Duke for life, remainder to their first and every other son in tail, with other remainders over. That upon the marriage of Lord *Hertford*, who was the eldest son and heir of the said Duke and Duchess, recoveries were suffered of the said manors, to the use of the Duchess for her life, remainder to the Duke for his life, remainder to the Lord *Hertford* in tail, with other remainders over. Then the bill set forth, that it was the custom of these several manors, for the lord or lady thereof for the time being to admit the several tenants of the manors to their respective estates, and that by virtue of such admittance the several tenants had a right to hold their respective estates, during the joint lives of such tenant and such admitting lord or lady. That in consideration of such admittances from the lord, the tenants have time out of mind respectively paid to such admitting lord a fine or *gressum*, which hath been generally assessed by the lord's steward at a court held for that purpose, called the court of dimissions. And that these fines or *gressums* are called the general fines, and are due to the next succeeding lord upon the death of the last admitting lord; by whose death there is a general determination of the estates of the tenants. That there are likewise other fines, which by the custom are due to the lord from these tenants; and those are, where the tenant dies, then his heir, who has a right to be admitted to his father's estate, is obliged to pay the lord a fine for such admittance. And where this tenant aliens his estate, the lord upon the admission of the alienee, has a right to a fine; and these fines which thus happen upon the death or alienation of the tenant are called *dropping* fines.

The fines the Duke demanded by this bill, were the general fines, which he insisted were due to him as next admitting lord, upon

upon the death of his lady, the Duchess of *Somerset*. And the bill set forth, that the Duchess being the lady of these manors, and having married the Duke, a court of dimissions was held in the names of the said Duke and Duchess, in order to grant the tenants new estates, their former having been determined by the death of Earl *Jocelyn*: and at such court, admittances were granted to the several tenants, *habendum* at the will of the lord, according to the custom of the said manors, during the joint lives of the said Duchess and the said tenant. That the defendants (being tenants of the said manors) held their estates under such admittances, till the death of the said Duchess; and that she being dead, the Duke became lord of the said manors, and the tenants estates being determined by the death of the Duchess, their admittances being only for their joint lives, the Duke, as next admitting lord, had a right to a general fine. And the bill set forth, that the Duke in pursuance of this right had called proper courts, and had regularly assessed the defendants fines; and that several of the tenants of these manors had submitted to pay their said fines; but that the defendants, with several others, had refused, under a pretence that a general fine was not due to the Duke, but was to be paid to the heir after his death. The bill therefore prayed that the Duke's title to these general fines might be established.

The defendants in their answer admitted the several allegations in Answer. the bill, and that the Duke was intitled to be tenant by the curtesy. They insisted that the fines which they were obliged to pay, were known and ascertained by custom, and that the lord was bound by such custom, and could not without their being parties, create any estate to a stranger, which would subject them to any extraordinary fines. They insisted that by the custom of these manors a lord who was tenant by the curtesy, or lady tenant in dower, had no right to a general fine; and that they were only obliged to pay a general fine to the lord who comes in by descent, or to him that comes in, *in loco haeredis*. They insisted that although the Duke was become tenant for life of these manors by the Duchess's death, yet no fine was due to him; for if he had been tenant by the curtesy, no fine would have been due, and his claiming by settlement cannot better his case; for then it would be in the power of the lords of such manors, to multiply the tenants fines, and greatly burthen their estates, if every such lord who hath an intervening estate by settlement should be intitled to a general fine.

Upon the 11th of *June* 1725. this cause came to be heard before the Lord Chancellor *King*.

Serjeant

Serjeant *Pengelly*, and *Yorke* Attorney General, argued for the Duke: that the Duke by this settlement was a purchaser, and stood *in loco haeredis*. That the tenants having accepted admittances to hold during the life of the tenant and the life of the Duchess, and the Duchess being dead, their estates were necessarily determined: and the fines being by custom due to the next admitting lord, and the Duke of *Somerset* being such lord, the fines were undoubtedly due to him, and there was no pretence that the payment of them should be postponed: nor is this any wrong or hardship upon the tenants, for this was a just and honest settlement, made without the least appearance of fraud, and upon the most valuable consideration in the law: nor is it any inconvenience to the tenants, for their estates will still depend upon the life of the lord, who admits them; and the life of a tenant for life, is as good as the life of a tenant in fee. It is in proof from several of our depositions, that tenants in dower, and tenants by the curtesy, have admitted in such cases, and have received general fines; and these instances determine the present question, and prove that the Duke hath an unquestionable right to the fines which he demands.

Wearg, Solicitor General, for the defendants argued, that the payment of these fines depends intirely upon the customs of these manors: and though the tenants estates should be determined by the death of the Duchess, yet it does not necessarily follow from thence, that the Duke is intitled to a general fine, unless there be a custom to support his claim. These fines were originally payable only to the heir, or a purchaser, and were paid in nature of a relief. We have many instances in our depositions, where tenants in dower and tenants by the curtesy have demanded these fines, and the tenants have refused to pay them; and it is the received notion throughout all the counties where these sort of customary estates prevail, that only the heir who comes in by descent, and he who comes in *in loco haeredis*, are intitled to a general fine.

This settlement which the Duke claims by, does not alter the nature of his estate; it is only a life estate, and what the law would have given him; it does not enlarge his estate, but only exempts him from being punished for waste. The tenants are strangers to this settlement, and are not at all concluded by it, and it must be considered as a fraud upon them, if it was intended to create such an estate in the Duke, as would necessarily multiply their fines and encrease the burthen upon their estates.

We adn it that dropping fines have been paid to tenants in dower and tenants by the curtesy; but no argument can be drawn from thence,

thence, that they are intitled to a general fine: and if the rule, that every admitting lord is intitled to a general fine, should prevail; then tenants for years of those manors, who are *domini pro tempore*, would be intitled; and the consequence of that would be, that short leases of these manors might be made, and the tenants be thereby oppressed by frequent and extravagant fines.

But what the defendants chiefly insist upon is, that there is no custom in any of these manors, or in any other manor of the same tenure, which can support the Duke's demand of a general fine; yet as the depositions contain contrariety of evidence upon this point, the fairest way of determining this question seems to be, by directing an issue, in which this custom and the Duke's right may be tried.

King Lord Chancellor. The first question arises upon the determination of the tenants estates; and they were undoubtedly determined upon the death of the Duchess of *Somerset*; for the grants or admittances being to each tenant to hold for his life and the life of the Duchess, the estate of each tenant is necessarily determined by her death.

The next and principal question is, whether a fine is due to the Duke from his tenants upon the death of his Duchess. And in the resolving this question it is first to be considered, upon what account these general fines become due: now it appears from the nature of these admittances, that upon the death of the last admitting lord, all the estates of the tenants, which are held under his admittances, are determined; and their estates being so determined, it is necessary for the tenants, before they can have any new estate, to have a regrant from the succeeding and next admitting lord, which regrant they have a right to, and that right gives their estates the denomination of *tenant-right-estates*: from hence it appears, that the fines which are paid, are paid upon account of the admission to the new estate; and therefore that lord who hath a right to admit, hath a right to the fines; the lord grants the tenant a new estate, and in consideration of that, a fine becomes due to him from the tenant. The only question then seems to be, whether the Duke hath a right to admit. And the tenants seem to agree that he has; for they allow that if a particular tenant dies, the Duke upon the admission of his heir, is intitled to a dropping fine: now how can the Duke be intitled to this dropping fine, if he be not the admitting lord? And if he hath a power to admit, and hath a right to a fine upon the determination of a particular estate by the death of a particular tenant, why hath he not an equal power to admit, and an equal right to his fines, upon the determination of the te-

nants estates in general by the death of the last admitting lord? it is very extraordinary to allow it in the one case, and not in the other: if a particular tenant dies, his estate is determined, and his heir must pay a fine to the Duke; yet if the last admitting lord dies, all the estates of the tenants are determined, and yet the Duke hath no right to a fine.

It hath been objected, that this is multiplying the fines of the tenants, and subjecting them to frequent burthens of this kind. But where is the inconveniency to the tenants? they are still to hold during their own lives and the life of the lord who admits them; and that is the very tenure of their estates: nay if a lessee for years, or any other *dominus pro tempore* should admit them, their estates would be good, according to these admittances, during their own lives and the life of such lord; and the determination of the lord's estate would have no influence upon theirs. Indeed if there should appear to be any fraud or contrivance in a settlement of this kind, by putting in a number of lives successively, on purpose to multiply the fines of the tenants; this court would undoubtedly interpose in such case, and relieve them; but in the present case nothing of that kind can be pretended.

These are my present thoughts upon this question: but as the counsel for the defendants have insisted upon having an issue tried, I readily agree to it.

And this being agreed to by the counsel for the Duke, an issue was directed to be tried at the bar of the court of King's Bench by a jury of *Middlesex*; which issue was this, *viz.* whether a general fine was due to the Duke of *Somerset* from the tenants of the manors of *Cockermouth*, &c. as next admitting lord, upon the death of the Duchess of *Somerset*.

And in the beginning of this term, this issue was accordingly tried before *Raymond* Chief Justice, Mr. Justice *Fortescue*, and Mr. Justice *Reynolds*, (Mr. Justice *Powys* being absent).

Upon the trial three points came in question in relation to evidence.

Lords of customary manors disallowed as witnesses.

1. Whether lords of other customary manors should be allowed as witnesses. And it was resolved, that they should not, because the present question concerned the right of lords of such manors, who came in by settlement to their fines; and therefore they had a plain interest in the event of the cause.

2. The second question arose upon this; the plaintiff's counsel offered to give in evidence, that several other tenants who hold of the manors in question, under the same tenure as the present defendants, had submitted and paid their fines to the Duke: and this evidence was opposed by the counsel of the defendants, who insisted, that what was done by other tenants could not be given in evidence against them, for they were strangers to the defendants, and had submitted since the suit was commenced. It was said, that even if a verdict had been recovered against the other tenants, it could not be given in evidence against the present defendants, much less a matter *in pais*, which was so recent, that it could be of no manner of weight.

It was allowed as evidence against the defendants, that other tenants had submitted, and paid.

To this it was answered, that it being a custom which was now trying, it was very proper to give in evidence the acts and usages of the tenants of the same manors. And the case of the city of *London v. Clarke* in this court before *Holt* Chief Justice was cited, where (it was said) verdicts against former defendants who were in the like circumstances as the then defendants, were permitted to be given in evidence. So in the case of toll, where actions are brought for not paying it, the plaintiff is always allowed to give in evidence payment by others; unless it be made appear, that such payment was by collusion. So in the case of *modus's* this kind of evidence is always allowed.

Carthew 181.

The court held, that they never knew this kind of evidence denied; and the weight of it, and the recency of the fact, were circumstances entirely proper for the jury: so the plaintiff was allowed to give the evidence he offered.

3. The third point was the most material, and that arose upon the plaintiff's offering to give in evidence several instances of fines being paid in like cases, to lords of other manors.

Customs of other manors given in evidence.

This was opposed by the Solicitor General for the defendants, who insisted, that this kind of evidence could not be given; for the custom which was now in dispute, was used and confined to the manors in question; and therefore no custom which prevailed in other manors, could be any ways applicable to the particular custom now in dispute. Customs are different in different manors, and it would be of the worst consequence, and create the utmost confusion, if the custom of one manor should be allowed in proof to support the custom of another manor. Customs of particular manors are in their nature distinct, but if this sort of evidence should be allowed, the customs of all manors must become the same: in some

some manors heriots are paid, in some not; in some the fines are certain, in some arbitrary; but because a heriot is paid in the manor of *A.* is it therefore any reason that a heriot must be paid in the manor of *B.*? Certainly no; for the custom of one manor can by no means be conclusive upon another manor; because each manor hath its particular customs, and they have no relation to one another, but by accident. Each manor hath its own customs, and the validity of those customs must depend upon their own strength, without having any assistance from the customs which prevail in other manors.

Serjeant *Wynne* of the same side said, that it had been the constant practice on the northern circuit, where questions of this kind frequently arose, always to disallow of this sort of evidence; and he cited a case, in which Mr. Justice *Reynolds* ruled it so, the last assizes at *Carlisle*.

Serjeant *Pengelly contra.* The evidence we offer, is in order to shew the uniformity of the customs of these kinds of manors in general, throughout the whole county. We do not say, that because there is such a custom in one manor, that there must therefore necessarily be the same custom in another; no, we are only attempting to explain the nature and tenure of these customary estates, and are going to shew, that wherever these sort of estates prevail, the lords who have been tenants for life of such manors, have always, without any controversy, received their general fines: and this must certainly be very proper evidence in the present question: it will prove, that it is the nature of these estates in all places where they prevail, to be subject to the payment of fines in like cases, and that it is the undoubted privilege of like lords to be intitled to them. If there should be a question whether a copyhold can be entailed; the party would have liberty to give in evidence the custom of entailing in other manors. But I hope the court will have no difficulty in allowing this sort of evidence, since this very question hath been already determined upon a solemn trial at bar between *Chapman* and *Atkinson*, *Mich. 24 Car. 2. B. R. 3 Keb. 90.* where the question was, whether a general fine was due to an infant succeeding lord, during his minority; and upon the trial of this issue, the defendants gave in evidence, that other manors adjoining had the same custom not to pay to the lord till he was of full age; and the book says, that the court held this evidence to be good.

Attorney General of the same side, The present question concerns the nature of customary estates in general; and this is a tenure by which the greatest part of the estates in the northern counties are held;

held: it is not the custom of these particular manors, which the present question is confined to, but the question relates to these estates in general, and therefore it is very proper to examine into the tenure and nature of these estates in all other places where they prevail. The issue which is to be tried is not whether there is such a custom in these particular manors, but whether the Duke of *Somerset*, as next admitting lord, hath a right to these fines; so that the right is the thing in question, and to prove that he hath a right, we are going to shew, that it is the nature of these estates to be subject to a general fine in such cases. If any dispute should arise about *Gavelkind* lands which lie out of the county of *Kent*, (as some lands of that tenure do) can it be pretended, that the party would not be admitted in that case, to examine into the custom of *Gavelkind* in general? And it is no more that we contend for in the present case; we only desire that we may give evidence of what is the general custom of tenant-right estates.

Lutwyche of the same side, I have gone the northern circuit many years, and I have always observed it to be the practice, to allow this sort of evidence (and in this *Bootle* and *Fazakerley* who had gone the same circuit many years, and were of counsel with the Duke, agreed with him.) He cited the case of *Relf*, which was tried some years ago at *Carlisle*, and was thus: *A.* was lord of a manor, and was the last general admitting lord, and sold the manor to *B.* afterwards *C.* one of the customary tenants of the said manor died, and *B.* admitted his heir; then *A.* who was the last general admitting lord, died; and *B.* demanded a fine of the heir of *C.* and upon the heir's refusing to pay it, *B.* brought his action against him to recover it; and upon the trial *B.* was permitted to give evidence of what was the custom of other manors throughout the county.

Raymond Chief Justice, I have always looked upon it as a settled principle in the law, that the customs of one manor shall not be given in evidence to explain the custom of another manor; for if this kind of evidence should be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same. I should readily admit that this evidence might be allowed, if the customs of tenant-right estates were the same in all manors; but it is plain that the customs of these estates are different in different manors: for these reasons I am inclined in my own private opinion, to disallow the evidence, which is now offered: but upon the authority of the case in *Keble*, and upon the credit of the gentlemen who go the northern circuit, and affirm that it has been

the constant practice to allow this kind of evidence there, I must submit, though against my own opinion.

Fortescue Justice, I think the evidence which is offered ought to be allowed; there is a great difference betwixt the *custom* of a manor, and the *tenure* of a manor; and the question which we are now trying merely concerns the *tenure* of the plaintiff's manors; therefore it is very proper to enquire, what are the qualities which attend other estates, which are held by the same *tenure*. And it must give great satisfaction to those who are to try the present question, to know how far this quality of paying fines in like cases, has attended the like tenure in other manors. I think the case in *Keble* is a plain authority, and we must follow precedents.

Reynolds Justice, I have been always of opinion, that the customs of one manor could not be made use of to influence the customs of another. And so it has always been held in cases where the dispute is concerning the intailing of a copyhold; where the customs of adjoining manors are never allowed, as evidence to support the custom of the particular manor in question. But upon the authority of the case which has been cited, and upon what has been affirmed by the gentlemen at the bar, I submit that the evidence that is offered shall be allowed, though it is contrary to the notion I have always had of the rules of evidence.

N. B. It was intended to send down to C. B. for their opinions, but they were up; however upon putting the case to them and the Barons of the Exchequer, they were all of opinion (as Judge Denton told me) that the evidence of other manors should not have been allowed, and said they had never known it.

Upon this, the plaintiff proceeded to give evidence of the customs of other manors.

And after a long examination of witnesses in relation to the customs, and what had happened in other manors, *viz.* that tenants in dower, jointureesses, and tenants for life by settlements, had had general fines paid to them by their tenants; the jury, by the direction of the court, brought in a verdict for the plaintiff the Duke of Somerset.

And at the end of this term, the cause came on again before the Lord Chancellor, who decreed the tenants to pay their fines, and gave the Duke his costs.

Dominus Rex *vers.* Collingburne.

THIS was an order of sessions made at *Hicks's Hall*, for the discharge of an apprentice to a freeman of the city of *London*, and who was bound and inrolled there: and the order being removed hither, there were these exceptions taken to it.

1. That the apprentice was bound and inrolled in *London*. 2. Not bound by the justices. 3. Not a trade within the statute, he being a glazier.

To these exceptions it was answered, that the clause of the statute 5 *Eliz. c. 4. §. 35.* enacts, "That if any master shall misuse his apprentice, he shall repair unto one justice of the peace where he dwelleth, &c. And §. 40. provides, "That the customs of *London* and *Norwich* shall be saved." *Sect. 35.* has always received a large construction in favour of the jurisdiction of justices, for though upon the master's complaint no power is given to the justices to discharge, yet in 21 *Car. 2. 1 Saund. 313. 1 Vent. 175. Hawksworth* and *Hillarie's* case, it is held, that it was reasonable, and within the intent of the statute, that an apprentice should be discharged from an ill master, as well as a master should be discharged from an ill apprentice; and in 1 *Mod. Wilkins v. Edwards* there is the same point, and in 1 *Vent. 174.*

A. is bound apprentice to B. who is a freeman of the city of London, and A. is bound and inrolled there, then goes and lives with his master in Middlesex. The justices of the peace for the county may discharge him. L. Raym. 1410.

1. The first and principal question is, whether the court of sessions at *Hicks's Hall* have any jurisdiction to discharge an apprentice to a freeman of *London*; or whether he is not to be discharged only by the mayor's court. It is found that the apprentice lived with his master out of the city of *London*, and within the jurisdiction of the justices of *Middlesex*.

To this exception it was answered, that the statute does not regard where the binding or inrolling is, but gives the jurisdiction expressly to the justices of peace where the master lives; and if this did not belong to the justices of *Middlesex*, where the master lives, there would be a failure of justice; for neither the chamberlain, or any other city magistrate, have power to compel the master's appearance before them.

2. To the second exception it was said, that it was immaterial where the apprentice was bound, for the same reason.

3. And to the third exception it was said, that formerly indeed it was a doubt, whether the statute did extend to all trades; but of late it hath been settled and agreed, that it does. *Salk. 471. Palm. 526. 2 Keb. 822. Rex v. Taunton, Hil. 6 Geo.* The

The court affirmed the order of discharge, and said they would not take away the jurisdiction of the mayor's court, but only give a concurrent jurisdiction to the justices of the peace for the county. And it would be very inconvenient, to have apprentices to a freeman of *London*, who are bound there, and who live in distant countries, obliged to come up to the mayor's court to get themselves discharged: and the words of the statute are very plain; for they give the jurisdiction to the justices where the apprentice lives.

Cheval *vers.* Nichols. In Scaccario.

Annuity granted out of lands lying in *Middlesex*; *A.* hath notice of this grant, and then purchases the inheritance of the lands; the grantee shall have his annuity against *A.* though his grant was not registered.

ONE *John Hall* was possessed of a term for years in certain lands lying in the county of *Middlesex*, and granted an annuity of 40 *l.* to the plaintiff, to be issuing out of the lands. The defendant being concerned for this *Hall* in the management of some of his affairs, knew that *Hall* had granted this annuity to the plaintiff, and had seen the deed, and paid him part of the annuity upon *Hall's* account: afterwards *Hall* purchases the reversion of these lands, and then the defendant purchases the term and the reversion of *Hall*. *Hall* dies, and the defendant refused to pay the plaintiff his annuity, because the deed by which *Hall* had granted it was not registered according to the statute 7 *Ann. c.* 20. which requires that all deeds or conveyances of, and all incumbrances upon, lands lying in the county of *Middlesex*, shall be registered within such a time at the office; otherwise every such conveyance shall be void against any subsequent purchaser for a valuable consideration. The defendant therefore insisted that he was a subsequent purchaser for a valuable consideration, and that the plaintiff's claim of an annuity could not affect him, because it was not registered.

The whole court were clearly of opinion, that the plaintiff was intitled to have his annuity out of these lands against the defendant, notwithstanding this statute. For the statute only intended to give such notice of former incumbrances to purchasers, that they might not thereby be defrauded; but if a man knows of his own knowledge, that there is a prior incumbrance, and notwithstanding that knowledge will be a purchaser, the statute was never intended to relieve such, though the first incumbrance was not registered. For where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience; and in a court of equity his purchase shall never be established.

Therefore they decreed the plaintiff his annuity and the arrears.

Buckley

Buckley *vers.* Nightingale. In C. B.

THE plaintiff as administrator of the goods and chattels of *An heir hath* *Joan Terry* widow deceased, which were unadministred by lands by hereditary descent, yet he brought an action of debt against the defendant as son and heir of *John Terry* deceased, who was the executor of the said *Joan*, shall not be liable for the debt of his ancestor any further than to the value of the lands descended. *Matthew Nightingale* deceased, upon a bond executed by the said *Matthew* the father, for the payment of 200 *l.* to the said *Joan*. The defendant pleads, and admits that he is son and heir of the said *Matthew* (the obligor), but says that the said obligor his father in his life-time was seised of a mesuage or tenement called *Pryors*, and in consideration of the sum of 300 *l.* demised the same to *J. S.* for ninety-nine years, reserving only a pepper corn yearly rent; and that the said defendant hath not any lands or tenements by hereditary descent, nor had he *ad diem impetrationis brevis originalis praed'*, or at any time after, except the reversion of the said mesuage and tenement, and one mesuage and three roods of land in *R.* being together of the value of 300 *l.* and no more; and then he sets forth, that the obligor his father, in his life-time, before his entering into the said bond upon which this action was brought, did become bound to one *Thomas Poole* in 120 *l.* which last bond at the time of his death was in full force and undischarged; and then goes on and sets forth in like manner three other bonds, each for the sum of 200 *l.* in which his said father was bound to three other persons; and shews that he died and left the said bonds standing against him in full force and virtue: then the defendant says, that long *ante impetrationem brevis originalis praed'* of the plaintiff, *viz.* upon the first of *June* 1720. he, the defendant, agreed with the several persons aforesaid to whom his father was bound, to pay them the several sums aforesaid, which in the whole amounted to 600 *l.* which he avers is more than the value of the said mesuage and tenement and lands in *R.* and the reversion; *et petit judicium si ipse ut filius et haeres ipsius Matthei patris de debito praed' virtute scripti praed' onerari debeat, &c.* and then avers that the said *Joan Terry* in her life-time refused to accept in satisfaction of her said debt, her proportion of the said sum from the defendant together with the rest of the said creditors. To this plea the plaintiff demurred.

And upon argument the whole court were of opinion, that the defendant's plea was good; for though it was the defendant's debt because his ancestor had bound him, yet he is liable no further than to the value of the land descended; and as soon as he has paid his ancestor's debts to the value of the land, he shall hold the land

discharged. Otherwise he might be chargeable *ad infinitum*. The cases which were cited in the argument were 20 H. 7. 5. 6. *Keilw.* 62, 63, 64. 26 H. 8. 1. *Plow.* 440.

Browning *vers.* Newman.

At Guildhall coram Raymond C. J. de B. R.

Cafe for words by which he lost the custom of J. S. and several others; the plaintiff shall only be admitted to prove the loss of J. S.'s custom particularly.

THIS was an action upon the case for these words; "You are a thief, and I will prove you so." The plaintiff declared that by reason of the defendant's speaking them, one *John Merry* and divers others, who were his customers, left off dealing with him in his trade.

Upon the trial the plaintiff proved the speaking the words, and the special damage as to *Merry*; and would have gone on to prove by several others, that they had likewise left off dealing with him by reason of the defendant's speaking these words.

But the defendant opposed this; because (as he insisted) he could not be supposed to be prepared to answer such uncertain kind of evidence.

The Chief Justice said, That in actions for words which are not in themselves actionable, and where the special damage is the *gist* of the action, this sort of evidence is allowed, though the particular instances of such damages are not specified in the declaration: but in actions for words which are in themselves actionable, (as the present words are) particular instances of special damage shall not be given in evidence, unless particularized in the declaration. And therefore he thought the plaintiff could not be allowed to give particular instances of the loss of any other customer, except *Merry*. He said that he had known it ruled otherwise; but that this was his opinion: however he admitted the plaintiff to give general evidence of the loss of customers.

But he may give general evidence of the loss of customers.

Marriot *vers.* Marriot. In Scaccario.

After probate of the will a court of equity may inquire into the fairness of a residuary devise of personal estate.

MARRIOT, Master of the Exchequer of pleas, made his will, and left his wife executrix and residuary legatee. His sons were plaintiffs in this case, and contended, that this devise of the *residuum* was gotten by fraudulent means, and by surprize. The wife produced the probate of the will; and the counsel in behalf of the wife the defendant contended, that the probate of the will was conclusive

conclusive evidence touching this disposition of the *residuum*, and that a court of equity could not look into the same, but that it was merely of ecclesiastical jurisdiction, and to be determined there.

And in this question four things were considered by the court. *First*, How the jurisdiction of testamentary matters stood by the civil law.

The way of authenticating wills in the civil law was first before the *praetor*, and afterwards before the *magister census*, for they reckoned wills to be in the nature of judgments or decisions that a man himself made touching his estate. And therefore they were shut up with the magistrate during the life of the person, for the quiet and repose of the family, but were opened after his decease. They were signed by the testator, and sealed by him, and by the witnesses, upon a thread, and carried in to the *praetor*: after the death of the party the witnesses were called if living, to acknowledge their seals; if they were not living, then the seals were broke, and the will opened, in the presence of other sufficient witnesses; and the will was read and registered, and a copy of it delivered over to any person that would ask for the same. For it was reckoned as a matter of record, and therefore any person might have access to it. For this see *Digest. lib. 28. tit. 1. Qui testamenta facere possunt, et quemadmodum testamenta fiant*: and *Cod. lib. 6. tit. 32. Quemadmodum testamenta aperiantur, &c.* When any legacy was disposed of to pious uses for the use of the church, or for monasteries, or for the poor, the bishops were to sue for the same, and see to the administration thereof. This appears by the *Code, lib. 1. tit. 3. leg. 42. §. 6. necessarium. §. 7. §. 8. and §. 9.*

Tract. Tractatum, to. 1. fo. 38. b. n. 8.

Tract. Tractatum, to. 14. fo. 200. n. 89.

Upon this the bishop began to intermeddle with the probate of wills, which was a temporal authority. But this *Justinian* would not endure, and therefore in his *Code* he puts the law against the bishop's probate of wills before the laws herein before mentioned: and it is afterwards said, *eodem tit. leg. 41. Repetita promulgatione, non solum iudices quorumlibet tribunalium, verum etiam defensores ecclesiarum hujus almae urbis, quos turpissimum insinuandi ultimas deficientium voluntates genus irrepserrat, praemonendos esse censemus, ne rem attingant, quae nemini prorsus omnium, secundum constitutionum praecepta, praeterquam magistro census, competit; absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint [ostendere] disceptationum esse forensium: temeratoribus hujus sanctionis poena quinquaginta librarum auri feriendis: datum XIII. Kal. Dec. C. P. Justiniano A. H. et Opiliano Coss. DXXIII.* Thus things stood by the civil law.

Tract. Trac-
tatum, to. 14.
fo. 199. n. 88.

We come now, in the second place, to consider how things stood by the canon law. The popes, as their power increased, endeavoured to get the jurisdiction over testaments; and this appears by the decretal, *lib. 3. tit. 26. c. 6. Si haeredes iussa testatoris non adimpleverint, ab episcopo loci illius omnis res quae eis relicta est canonice interdicatur, cum fructibus et caeteris emolumentis, ut vota defuncti adimpleantur.* And likewise *Decret. lib. 3. tit. 26. de testamentis, c. 17. Tua nobis fraternitas intimavit, quod nonnulli tam religiosi quam clerici seculares, aut laici, pecuniam et alia bona quae per manus eorum ex testamentis decedentium debent in usus pios expendi, non dubitant aliis usibus applicare; cum igitur in omnibus piis voluntatibus sit per locorum episcopos providendum, ut secundum defuncti voluntatem universa procedant, licet etiam a testatoribus id contingeret interdici: mandamus quatenus executores testamentorum huiusmodi, ut bona ipsa fideliter et plenarie in usus praedictos expendant, monitione praemissa, compellas.*

Pope Innocent the fourth upon this law, *fol. 152.* says, that the bishop may dispense this charity, if there be no executor appointed by the will, and if there be an executor and he does not fulfil the will, that then he may take it to himself. *Decret. lib. 3. de testamentis, tit. 26. c. 19. Johannes clericus et P. laicus executores ultimae voluntatis O. clerici sanctae crucis, qui venerabilibus et piis locis de bonis suis in ultima voluntate legavit, mandans insuper satisfieri creditoribus per eosdem, post mandatum susceptum per dioecesanum cogi debent testatoris explere ultimam voluntatem. Vide Innocent. in legem 153.*

Pan. to. 4. fo.
157.

Panormitan upon the law, *Si haeredes*, says, that this matter of wills, even where the devise is to pious uses, is *mixti fori*, and that the heir or executor is to have a year's time to fulfil the will, before he can be compelled to it by ecclesiastical censure.

Pan. to. 4. fo.
176.

Upon the law, *Tua nobis*, *Panormitan* says, that the bishop is to compel by ecclesiastical censure the executor to perform the will to pious uses, although the will itself says, that the bishop was not to intermeddle: for they look upon that as an irrational part of the devise, which is in itself void.

Pan. to. 4. fo.
179, 180.

The last chapter, *verbo Johannes*; The case as *Panormitan* states it was, where after debts paid the residue was left to pious uses, and there the bishop was to compel the payment of debts, and afterwards to see the disposition of the *residuum*. I do not find that any of the canonists pretend, that wills are of ecclesiastical cognizance *sua natura*, but only such wills as were made for pious uses.

Lyndwood,

Lyndwood, fo. 174. verbo Approbatis says, that jurisdiction of the ecclesiastical courts touching testamentary matters is by the custom of *England*, and not by the ecclesiastical law.

We are thirdly to consider upon what foot the ecclesiastical jurisdiction stood by the law of *England*. In *England* the bishop and sheriff sat together in the county court, as it appears by the laws of King *Edgar*, cap. 5. *de comitiis. Centuriae comitiis quisque (ut ante praescribitur) interesse: oppidana ter quotannis habeantur comitia: celeberrimus autem ex omni satrapia bis quotannis conventus agatur, cui quidem illius dioecesis episcopus et senator intersunto, quorum alter jura divina, alter humana populo edoceto. Leges Canut. c. 17. de comitiis municipalibus. Et ter in anno habeantur comitia municipalia, et duo conventus provinciales, aut plures etiam, et illis intersit episcopus ac senator, et ibi ubique doceatur tam jus divinum quam humanum.*

Wilkins 78.
Lamb. Saxon
Laws 69.

From these laws it plainly appears that the probate of testaments was in the county courts. *William* the conqueror was the first that separated the ecclesiastical court from the civil. *Selden* in his notes upon *Eadmerus* 167. gives us the very charter of such separation. *Propterea mando et regia auctoritate praecipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred. placita teneat: nec causam quae ad regimen animarum pertinet, ad judicium secularium hominum adducant.* This charter, as Mr. *Selden* has told us, was recited in a close roll of *Richard* the second, and then confirmed: but the charter of *William* the first does not mention matters testamentary, or the probate of wills, to be of ecclesiastical cognizance. It only says, that the crimes that were to be prosecuted *pro salute animae*, were to be of that cognizance.

That which seems first to have given birth to the ecclesiastical jurisdiction, was the charter of *Henry* the first: which says, *Si quis baronum vel hominum meorum infirmabitur, sicut ipse debet vel dare disposuerit pecuniam suam, ita datum esse concedo, quod si ipse praeventus vel armis vel infirmitate pecuniam suam nec dederit nec dare disposuerit, uxor sua, sive liberi aut parentes et legitimi homines sui, pro anima ejus eam dividant.* This let in the several canons before mentioned into *England*: for since the personal estate was to be disposed of for the soul, they looked upon every will to be a disposition of the testator in a gratuitous or charitable manner: that whatever was left, was to be disposed of by the executor for the good of the soul: so that all the canons touching charitable dispositions were to take place in *England*.

Mat. Paris;
fol. 56.

In the time of *Richard* the first, when he was in confinement, the clergy got a confirmation from him of the ecclesiastical immunities: this is mentioned by *Mat. Paris* 161. *Item distributio rerum quae in testamento relinquuntur auctoritate ecclesiae fiet, nec decima pars ut olim subtrahetur: si quis enim subitanea morte vel quolibet casu praeoccupatus fuerit, ut de rebus suis disponere non possit, distributio bonorum ejus ecclesiastica auctoritate fiet.* This charter is likewise mentioned in the same terms in *Radolphus de Diceto*, one of the *Decem scriptores* F. 658. And these ecclesiastical immunities were confirmed by the pope, and the confirmation appears in 1 *Vol. Foedera* 104. though there is no express mention of a testamentary jurisdiction. Note also it appears by the charter, that the King releases the tenth, that used to be taken on the death of the tenant; and henceforward the King and his Lords only took heriots as an acknowledgment in lieu of such decimation.

From henceforth the ecclesiastical court began to consider a proper method for the publication of wills; therefore when any person died, they summoned in the executor or next relation to take care of his soul, and the executor was obliged to bring in the will. And both executor and administrator were obliged to bring in an inventory of his goods, and the charges were heightened, by the canons, in order to bring every thing into the ecclesiastical court: *Lyndw.* 176. Canon of *Simon Mepham*. And it appears by the canon of *Stratford*, that the residue in the hands of the executor was to be distributed for the good of the soul. *Lyndw.* 178. And by the canon of *Otobon* an inventory was to be exhibited. *Lyndw.* 107.

Notwithstanding all this the jurisdiction of the county courts still continued, for this was acknowledged to be a matter *mixti fori*, and therefore they could not hinder the county court from proceeding, even according to their own canon law. But in order to get the whole jurisdiction, in the time of *Richard* the second, as is mentioned by *Selden* in his notes on *Eadmerus*, they got the right to publish the law of *William* the conqueror, and confirm the same; that no matters of ecclesiastical cognizance should be transacted in the county courts, this is in the charter of 2 R. 2. *Membran.* 12. n. 5. and is mentioned in *Selden's Eadmerus* 168.

From henceforward the clergy had the whole jurisdiction of wills, because the county court could not receive the probate, and the King's court had never intermeddled with it; for by the charter of *Rich.* 1. herein before mentioned, and likewise by *Magna charta*, cap. 18. the King had granted the liberty to his own tenants, to dispose of their goods, and therefore the will touching personal estate

estate never received any sanction in the immediate court of the King.

This reconciles that case in *Fitzberbert's Abridgment*, tit. *Testament*, fol. 148. said by *Fairfax*, that it was but of late, that the church had the probate of wills, which was by an act, I suppose he must mean the confirmation, of *Ric. 2.* before mentioned, for there is no act of Parliament that gives them that probate. And he says, that in other countries the probate was of temporal cognizance, which *Selden* notes to be true in all countries, except *France*. And *Tremaile* in that case asserts the usage of proving wills in courts-baron, which certainly may be where the custom prevails.

In 11 H. 7. 12. *Fineux* asserts, that the probate of wills did not belong to the spiritual court by the ecclesiastical law, but came to them by custom and usage only: and these are the foundations on which my Lord *Coke* in *Hensloe's case*, 9 Rep. fol. 38. concludes, that when the will is proved in the ecclesiastical court, that court has executed its authority; but the executors are to sue in the temporal courts, to get in the estate of the deceased.

Fourthly, we are to see what have been the several distinctions in our law touching this jurisdiction, which will fall under five heads.

1. That the spiritual court is the only court now, that has authority to receive the probate of wills, and to give a sanction to them; because the jurisdiction of the county court is lost by non-usage; and since *Magna charta*, cap. 18. the King's courts did not intermeddle with the goods of a deceased tenant. But here must be excepted all courts-baron that have had probate of wills time out of mind, and have always continued that usage.

2. The seal of the ecclesiastical court does authenticate the will, ^{2 Roll. Abr.} for there the will is to be brought in and proved. And therefore ^{299.} the case in *Raymond* 406, 407. is certainly good law, that the seal of the ordinary cannot be contradicted, because if there be no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination must there be final: for the temporal court cannot make a judgment concerning the will contrary to what was made in the ecclesiastical court; and therefore it is certainly good law, that if they shew a probate under the seal of the ordinary, they cannot give in evidence that the will was forged, or that the testator was *non compos mentis*, or that another person was executor; but they may give in evidence that the seal was forged, or that there were *bona notabilia*, because that is not
in

in contradiction to the real seal of the courts; but it admits the seal, and avoids it. 1 *Lev.* 235. *Vaughan* 207. 1 *Show.* 293. And since the ecclesiastical court has the probate of wills now settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was *compos mentis* or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Hardr.* 131, 313.

3. If a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the temporal law, or else the temporal courts will prohibit. As if payment be pleaded in bar of a legacy, and there is but one witness, which the ecclesiastical court will not admit; there the temporal courts will prohibit them, because it is a matter temporal that bars the ecclesiastical demand. *Shutter et ux' v. Friend*, 1 *Show.* 158, 173. 1 *Vent.* 291. 3 *Mod.* 283. But if upon the probate of the will they allege on the other side, that the will was revoked, and they would prove the revocation by one witness, according to the resolution in *Yelverton* in the case of *Brown v. Wentworth*, fol. 92, 93. they might be prohibited from granting the probate; but that resolution, which was only of three Judges against two, and seems against the opinion of *Rolle*, 2 *Abr.* 299. seems to intrench upon their jurisdiction; for if they cannot judge by their law, whether the will is revoked or not, they cannot judge whether there is a will or no will: indeed the judges there say, that the revocation is a temporal matter, and therefore it is to be proved according to their law, by one witness; but then they will not be suffered to determine touching the validity of a will of personal estate, which every body allows to be of ecclesiastical cognizance. But if the spiritual court do admit a will, and yet will not give the probate out to an executor, because he cannot give security for a just administration, it seems that a *mandamus* will lie. And this was resolved in the case of *The King v. Sir Richard Raines*, *Mich.* 10 *W.* 3. in *B. R.* For though they are to determine, whether there be a will or no will, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will; and therefore if they will not grant the probate, where they admit there is an executor, the court will grant a *mandamus*.

Salk. 299.

4. If a man give lands to be sold for the payment of debts, and disposes of the money to several persons; that cannot be sued for in an ecclesiastical court, but only in a court of equity, because that is not a legacy merely of goods and chattels, but it arises originally out of lands and tenements, and they have a testamentary jurisdiction touching chattels only. *Hob.* 365. *case* 345. 2 *Rol. Ab.* 285.

5. The

5. The courts of equity can hold plea concerning a legacy, and likewise concerning the devise of the *residuum*, which is but a legacy. They may in notorious cases declare a legatee, that has obtained a legacy by fraud, to be a trustee for another: as if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee. As to the devise of the *residuum*, nothing can be more clear: for since the case of *Foster v. Monk*, wherever an executor had a specifick legacy, ^{1 Vern. 473} he was looked upon as a trustee for the relations in a course of distribution: and no body ever attacked these resolutions upon this head of argument, that they were contrary to the ecclesiastical jurisdiction. But in all such cases a court of equity must consider what is the real will of the testator, and they cannot declare a trust according to their own fancy, nor according to what the testator should have willed, for then they make the will, and not the testator. But they may, to answer the real intention of the testator, declare a trust upon such will, though it be not contained in the will itself; which is in these three cases. 1. In that of fraud upon a legatary before mentioned. 2. Where the words imply a trust for the relations, as in the case of a specifick devise to executors, and no disposition of the *residuum*. 3. In the case of the legatee promising the testator to stand as a trustee for another. And no body has thought, that declaring a trust in any of those cases is an infringement of the ecclesiastical jurisdiction.

The court being thus of opinion, that they had a power to relieve against the devise of the *residuum*, they directed proper issues to try the matters of fraud and surprize insisted on by the plaintiffs, against which decree the defendant brought an appeal, but before any thing further was done upon it, the plaintiffs and defendant agreed to divide the *residuum* between them.

Jefferies *vers.* Austin.

In Middlesex, coram Eyre, C. J. de C. B.

Confidera-
tion of a pro-
missory note
inquired into.

IN an action upon the case upon a promissory note brought by the person to whom it was payable, the Chief Justice let the defendant in, to shew that it was delivered in the nature of an escrow, viz. as a reward, in case he procured the defendant to be restored to an office; which it being proved he did not effect, there was a verdict for the defendant.

Dominus Rex *vers.* Major' de Canterbury.

Where an
officer is at
pleasure, the
choice of an-
other is a de-
termination.

ON a *mandamus* to restore a recorder, they returned that he was only an officer at pleasure, and that upon due summons to chuse another, they did chuse another, *et perinde* the former was removed.

It was objected, that this was only argumentative, and that returns to writs of *mandamus* must be certain to every intent. *Et per cur'*, That is good general doctrine, but not applicable to this case. They needed not say any thing of his being removed, because the chusing another is a determination of their will, which is enough for them to shew.

Adjournatur. And at another day the Solicitor General objected, that the summons was only to elect a new recorder: and many a man, who would have appeared, had the summons been to remove, might absent himself when it was only to chuse a new one. *Et per cur'*, We must presume people know the effect and consequence of their own acts, that in the case of an officer at pleasure a new election is an actual amotion. 1 Vent. 342.

Pleading let-
ters patent
sub sigillo
without *sigil-
lat'* is well.

Then it was objected, that the letters patents are only said to be granted *sub magno sigillo Angliae*, without *sigillat'*. *Sed per cur'*, The word *sub* imports it; the other would be but a repetition. The return was allowed.

Wannel

Wannel *vers.* Camerar' Civit' London.

MANDAMUS to admit *George Wannel* to his freedom of the city of *London*: setting forth that he was bound apprentice to one *Samuel Vanreyven* of *London*, merchant-taylor, for seven years; that he had served out his time, and been admitted into the merchant-taylors company, and in due form presented to the chamberlain, who refused to admit him to his freedom.

By-law to oblige a joiner in *London* to be free of the joiners company, good.

The chamberlain returns, that *London* has time out of mind been a corporation, and consists of several societies, gilds and fraternities of freemen of the city; and that no person could ever be a freeman of the city, till he was a member of one of those fraternities. That time out of mind there has been a company called the joiners company. Then he returns a power to make by-laws, and that 19 October 6 W. & M. a by-law was made, reciting that several persons not free of the joiners company had exercised the trade of a joiner in an unskilful and fraudulent manner, which could not be redressed whilst such persons were not under the orders and regulations of the company; therefore it enacts that no person shall use that trade, who is not free of the company, under the penalty of 10 *l.* That the plaintiff did exercise the trade of a joiner, and that at the time of his being presented to the chamberlain he was not free of the joiners company, and therefore he does not admit him to the freedom of the city.

Upon this return the question was, whether this by-law, to oblige a member of one company to be admitted in another company, was good or not. And to prove it naught, the case of *Robinson v. Gros court*, 5 *Mod.* 104. was relied on, where a by-law to oblige all persons using musick and dancing, to be free of the company of musicians, was held void; and even there it did not appear that the person was free of any other company, as it does in this case.

On the other hand it was said, that this was a very reasonable by-law: since it tended to prevent frauds in trade. And of that opinion was the court, it being properest for such a person to be under the regulation of that company who understand the trade best. That the case of *Robinson v. Gros court* was adjudged upon the foot of a dancing-master's not being a trader; and there was no inconvenience to an honest man, in being free of this company rather than another.

But the Chief Justice started a difficulty, whether the plaintiff having served a merchant-taylor, could oblige the joiners company to admit him, it not being so stated in the return; and without that be taken for granted, the by-law will be void. To which it was answered by *Fortescue* Justice, That the imposing the penalty of 10 l. for not taking up his freedom, is the strongest implication that they are bound to grant it. *Per cur' ulterius concilium.*

It was argued a second time in last *Trinity* term by Mr. Reeve and the Solicitor General, much to the effect of the former argument. And now this term *Raymond* Chief Justice delivered the resolution of the court.

We are all of opinion, that this is a good by-law, being made in regulation of trade, and to prevent fraud and unskilfulness, of which none but a company that exercise the same trade can be judges. This does not take away his right to his freedom, but only his election of what company he shall be free; it is only to direct him to go to the proper company.

As to the objection, that it does not appear the joiners company are bound to admit him; we are all of opinion, that it being said he *shall* take up his freedom in that company under the penalty of 10 l. he will be intitled to have a *mandamus*, to prevent a forfeiture. *Per curiam*, The return must be allowed.

Hilary

Hilary Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt.* Lord Chief Justice.

Sir Littleton Powys, *Knt.*

Sir John Fortescue Aland, *Knt.* } Justices.

James Reynolds, *Esq;*

Sir Philip Yorke, *Knt.* Attorney General.

Sir Clement Wearg, *Knt.* Solicitor General.

Dominus Rex *vers.* Williams Major' de Helstone.

THE defendant was elected a corporator eight years ago, and an entry was made in the corporation books of his taking the oath of office, and the oaths of allegiance and supremacy: it was now moved for an information in nature of a *quo warranto* upon the affidavit of the town clerk, who swore, that he did not administer the oath of allegiance, though he made the entry in the manner it appeared to be. But the court would do nothing in it, after so long an acquiescence; and said it would be of dangerous consequence, to allow a town clerk to disqualify members by his own oath, contrary to the record.

Where there is an entry of administering oaths, there must be a recent prosecution if the fact be false.

Dominus Rex *vers.* Allington Recorder of Hertford.

If a justice
convicts
without sum-
mons, there
shall go an in-
formation.

L. Raym.

1407.

Ante 630.

THERE being affidavit made, that no summons was had in the case of the *King and Venables*, the court granted an information against the justice who made the conviction.

Case of the Prison of the King's Bench.

Rules of the
prison in-
larged till
prison repair-
ed.

THE prison being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and upon their attendance the court was moved to enlarge the rules of the prison, so as to take in the *Marshalsea*, that the prisoners might be removed thither. But the court would do nothing in it, till there was an undertaking by rule of court to put the prison in repair, which they said the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors submitted to a rule, and the rules were enlarged accordingly.

Between the Parishes of Kinver *and* Stone in com' Stafford.

Renting a
coney warren
is a settle-
ment.
Salk. 536.

UPON a special order of sessions, it was stated, that a poor person rented a coney warren and a cottage upon it at 10 *l.* *per ann.* which the justices were of opinion did not gain him a settlement within the statute of *Car. 2.* *Sed per curiam*, A mill has been held to be a tenement within that statute, and why not this? It is his ability to pay 10 *l.* *per ann.* that is the foundation of the settlement, and whether he pays it for a house for habitation, or for a warren which brings him in a profit, is not material: the order of sessions must be quashed.

Harrison *vers.* Winchcombe.

Plead double.

STRANGE moved for leave to plead *non assumpsit*, and *non assumpsit infra sex annos*, and cited *Folkes v. Smith* in *C. B. Mich. 12 Geo.* where there was the like rule; and in the principal case it was ordered accordingly.

Mich. 13 Geo. Bristow v. Woodward granted again on my motion. *Eodem termino Toepben v. Elking* the same rule.

Dominus

Dominus Rex *vers.* Buck.

STRANGE moved to quash an indictment for killing a hare, this not being a matter indictable, the statute of 5 Ann. c. 14. appointing a summary proceeding before justices of the peace; and cited *Rex v. James, Trin. 1 Geo.* where an indictment for keeping an alehouse was quashed, because the statute 3 Car. 1. c. 3. had directed a particular remedy. *Et per curiam*, The indictment must be quashed.

Indictment
lies not for
killing a hare

Parker *vers.* Stanton.

TO the *scire facias quare executio non* upon a writ of error, the plaintiff in error pleaded, that the damages recovered were levied upon a *feri facias*. And *Strange* moved to set aside this plea, saying it was never the intent of the court to give the party a liberty to plead to it, when it was only a method used to bring in the party to assign his errors; and that if this was to be once allowed, it would be done in all cases, and be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an issue to the *scire facias*, whilst the writ of error stood still for want of an assignment of errors. And he cited *Elmes v. Martin in B. R. Hil. 10 Geo.* where a plea of payment (which is the same in reason with the present case) was set aside. The Chief Justice at first made a difficulty of setting aside this plea, because it might be true, and then why should the party be brought in to shew cause why there should not be execution, when it has been had already. But the other Judges made no difficulty of setting it aside, on account of the apparent delay that it would introduce. And if execution has been had, the defendant may go on with his writ of error to obtain a restitution. So after great debate the plea was set aside. And in the debate of this case it was said by the court, and the secondary, that if issue had been joined on this plea, and it had been found for the defendant in error, he might have taken out execution, but could not *non pros.* the writ of error, till after a rule to assign errors.

Practice in
error.
L. Raym.
1414.

After this errors were assigned; and when the cause came on to be argued, it appeared to be an action of trover *pro duobus instrumentis ligneis, Anglice stands*. And it was objected by *Fazakerley*, who cited *Cro. El. 817. 1 Lev. 48. Sti. 327.* that there was a proper Latin word for *stands*, and therefore *instrumentum ligneum*, which would serve for any thing made of wood, was too general: but the court held it well enough, and the judgment was affirmed.

*Instrumentum
ligneum well
enough in
trover.*

Welsh

Welsh *vers.* Craig.

Debt lies not
upon a promissory note.

DEBT upon two promissory notes and a *mutuatus*. And on demurrer to the declaration, I objected, that an action of debt would not lie: that before the statute no action at all lay upon the note, as a note, (*Salk.* 129.) nor did an *indebitatus assumpsit* lie on a bill of exchange. And the only remedy given upon the note by the statute, is the same that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant. But then it was observed by Serjeant *J. Comyns* for the plaintiff, that there was one good count upon the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff, which I believe it will be difficult for him to enter, so as to maintain it.

Goswill *vers.* Dunkley.

In account a
discharge to a
common in-
tent is suffi-
cient.

IN account for a watch and sword delivered to the defendant, *ad mercandizandum*, he pleaded, that he carried them to *Porto Bello*, and in order to keep them safe, till he had a convenient opportunity to sell them, he put them into the warehouse of the *South-sea* company, and that the warehouse was broke open by enemies, and the watch taken away and lost, and that the sword had likewise been taken away, *nisi* an *Englishman* had put it on and claimed it as his, and that the defendant was forced to come away before he met with the *Englishman* to get it again. And on demurrer

It was objected by Serjeant *Whitaker*, that this was no good discharge; and he cited 1 *Roll. Abr.* 124, 125. *Yel.* 202. 1 *Bull.* 101. for these goods were delivered to the defendant under a special and particular trust; and that he could not defend himself against the plaintiff's demand, by shewing that he had lodged them in a warehouse, which was a committing them to the care of a third person, in which case he will be answerable for the loss.

Reeve contra. Though this is a personal trust, yet he is not bound to keep them always about him. If he was robbed of them himself, it is a discharge. 1 *Ven.* 122. 2 *Lev.* 5. 5 *E.* 4. 4. 9 *E.* 4. 40. *Et per curiam*, This is *prima facie* a good account: if the warehouse was not a place of safe custody, that should have been replied: a robbery there is the same as if from his own person, for a bailiff *ad mercandizandum* is not obliged to keep the goods always about him. At another day Serjeant *Hawkins pro quer'* endeavoured

to maintain the action, but the court stood to their former opinion, and gave judgment *pro defendente*.

Short *vers.* King.

THE plaintiff declared in ejectment on one demise, to which there was Not guilty pleaded; but afterwards finding it necessary to add the demise of the trustees, he delivered a new ejectment on the double demise. Whereupon I moved to stay the proceedings on this last, till payment of the costs, and for notice where the lessors were to be found; and grounded my motion for the first part on Lord *Coningby's* case, and for the latter on the common case of a *qui tam*, because here the lessor was to enter into a rule for costs. The court granted the last part, but as to the costs they said it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Coningby's* case, who came for a trial at bar on his new ejectment, after the former cause was ready for the bar, which was a matter of mere favour, in which they might make their own terms.

Practice in ejectment.

Ante 548.

Dobs *vers.* Edmonds.

THE plaintiff declared in trespass with a *quod cum*, and then went on to another trespass, which was introduced with a *necnon de eo quod, &c.* The verdict was *pro quer'* as to the last part, and *pro def'* as to the trespass under the *quod cum*. And it was moved in arrest of judgment, that the whole was but recital. *Sed per curiam*, We must not extend that exception, which has gone far enough already: the latter part is by way of positive charge, and the finding of the jury has cured it as to the first. The plaintiff must have judgment.

Necnon de eo quod after a quod cum is a positive charge.

L. Raym. 1413.

2 Show. 295. Cro. Jac. 536.

White *vers.* Cleaver.

DEBT upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indempnem conservavit*, without shewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no issue could be joined upon it. 2 Cro. 165. Hob. 296. 2 Co. 4. 2 Cro. 363, 503, 634. But then it was objected, that this should have been shewn for cause of demurrer. And of that opinion was the court, for the substance is the saving harmless, Where a plea is general *quod indempnem conservavit*, it must be shewn for cause that it does not say how.

L. Raym. 1416.

1 Lev. 194,
183.

and how that was done, is but matter of form; so the plaintiff prayed leave to discontinue upon payment of costs, which was granted accordingly.

Portman *vers.* Came.

Where executor must declare as executor, he shall pay no costs. L. Raym. 1413.

THE plaintiff brought an action of debt upon a bond as executor, and upon *oyer* it appeared to be conditioned, that the defendant should not hunt in any of the lands of the testator; and in the replication a breach was assigned by a hunting in the time of the executor, and a verdict for the defendant.

And now Serjeant *Chapple* moved for costs, because the hunting, which was the cause of action, arose in the time of the executor, and was a matter within his knowledge. 6 *Mod.* 91, 181. 1 *Ven.* 92. *Sed per curiam*, The cases are only where he needed not declare as executor, and so was *Baller v. Delander*, *Trin.* 1 *Geo.* in *B. R.* But here the bond was the cause of action, and he was obliged to declare as executor: and therefore they denied costs.

Lat. 214, 220.

Lady Cals *vers.* Title.

Verdict uncertain.

ERROR of a judgment in *C. B.* in ejectment on four demises of a different commencement and continuance: verdict for the plaintiff against two defendants only as to one third part of 28 acres of meadow; and as to the rest of the premises, and all the other defendants, Not guilty: upon which there is judgment, that the plaintiff shall recover *terminum suum praed' de et in praed' una tertia parte praed' 28 acrarum prati* against the two defendants who are found guilty, and that the acquitted defendants shall recover 7 *l.* costs.

Upon this judgment the two defendants, who were found guilty as to part, bring a writ of error, and assign the general errors. And *Strange pro quer' in errore* objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four several demises of a different commencement and continuance, and yet the judgment is only to recover *terminum suum praed'* in the singular number, without determining which of the terms he shall recover. *Hil.* 4 *Geo.* *B. R.* *Hodson v. Backhouse*: the writ of error was *de quadam transf. et ejection' firmae* instead of *firmarum*, there being two demises: and quashed.

1

2. It

2. It is impossible for the sheriff upon this judgment to know what he is to deliver possession of, for there are four demises of four different 28 acres of meadow, and whether the plaintiff is to have those which *A.* demised, or those which *B.* or *C.* or *D.* demised, is uncertain; it should have been to recover the 28 acres of meadow which the first, or second, or third, or fourth lessor demised. 1 *Book of Judgments* 74. 2 *Ditto* 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict no body can say which of the lessors title is established, nor can either of them bring an action upon it for the *mesne* profits.

Whitaker Serjeant *contra* did not offer to answer the objections, but said they would try below and get it set right: at present he took an exception to the writ of error, that it was only to remove a record of an ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other defendants to the suit: and though the writ can be brought only by these two *ad grave damnum* of themselves, yet the suit must be described as it really was. *Et per curiam*, So it should, and the case of *Cook* and *the Duchess of Hamilton* was cited. Then *Strange* insisted, that it was amendable by the late act; and of that opinion was the court, so the writ of error was amended. And as to the objections to the judgment, it was adjourned, to give the defendant in error an opportunity to set it right if he could. Variance.

Dent *vers.* Lingood.

THE defendant in error pleaded a release of errors, which was found for him; and the court ordered the entry to be, that the plaintiff should be barred of his writ of error, not *quod affirmetur*. How the entry shall be where a release of errors is found.

Between the Parishes of Westham and Chiddingstone.

IT was stated, that a single woman settled at *C.* was married to a man who is since dead, but his settlement did not appear: *Et per curiam*, Her settlement before marriage stands. Woman's settlement before marriage remains, if husband has no settlement.

Mich. 1 *Geo.*
int. paroch.
I unskwell
and *Upotery*,
held so like-

Hughes wife.

Hughes *vers.* Alvarez.

Writ of inquiry amended.

IN an action upon the case upon two promises, there was judgment for the plaintiff as to the first promise, and as to the second a *nolle prof.* A writ of inquiry is taken out to inquire what damages the plaintiff had sustained *occasione praemissorum*, and upon the return of this it was moved to amend the writ, and make it *occasione non performance praed' primae promissionis*: and upon the authority of *Baker v. Cambell, Pas. 4 Ann. in B. R.* the writ was amended in this case, the record of the judgment by default being a warrant to amend by.

Haywys *vers.* Savage.

Upon a special *capias* by original the defendant shall not be obliged to plead sooner than upon a common *latitat.*

A Special *capias* by original was taken out returnable *crastino animarum*, and for want of a plea to enter before the effoin day of *Hilary* term judgment was signed the 19th of *January*, which was now moved to be set aside. And it was agreed, that if this had been by bill, the defendant would not have been obliged to plead till within *Hilary* term. But I insisted, that it being a special *capias*, wherein the whole case was set out at large, it made it more reasonable, than where there is only a common *capias de placito transgressionis*. And it has been always taken to be for the expedition of the plaintiff, to sue out these special writs: whereas if this judgment be set aside, it will be putting them upon the same foot with a common *latitat.* The fact and practice was certainly on my side, but the court, out of a disinclination to favour proceedings by original, would not allow there was any difference, but set aside the judgment: so that now there is no advantage in taking out a special *capias*, and therefore I suppose it will be discontinued.

Helbut *vers.* Held.

No error to be assigned contrary to the record. L. Raym. 1414.

ERROR of a judgment in *C. B.* after verdict for the plaintiff. And it was assigned for error, that *Edward Richeir*, who was sworn as a juror returned upon the principal pannel, was never returned by the sheriff; and also that there was diminution in the record, for want of the *venire facias* and *habeas corpora*. And to this *in nullo est erratum* was pleaded.

Parker

Parker pro quer' in errore objected, that *in nullo est erratum* was a confession of the errors assigned, and then no doubt but that in point of law the swearing a person upon the jury, who was never returned by the sheriff, will make such an error in the proceedings, as will overthrow the judgment. 5 Co. 42.

Strange contra. I admit that where a matter of fact properly assignable is assigned for error, *in nullo est erratum* will be a confession; but where the matter alleged is not by law assignable, there *in nullo est erratum* is a demurrer in law; it is insisting the party has no right to assign such a matter for error, and that therefore the defendant ought not to be drawn into an inquiry about the truth of it. And I take it the error here alleged is not assignable, as being contrary to the record: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem*, says the record, *jurata inter partes praed' ponitur in respectu* till the next term, *nisi prius* the Chief Justice comes to Guildhall: at which time he comes, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff) *viz. Edwardus Richier ven' et in juratam illam juratus existit*: so that the record expressly says, that the *Edward Richier* who was sworn, was one of them that was returned by the sheriff; and therefore the error assigned is contrary to the record: and that such an error is not assignable, I rely on 1 *Roll. Abr.* 758. pl. 8. If *A. B.* is sworn upon the principal pannel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error, that the *A. B.* first sworn and *A. B.* the *tales* man were one and the same person, so as to make it a trial by eleven jurors only; for that this (says the book) is contrary to the record, which says that they who were sworn upon the *tales* were *alii de circumstantibus*: he could not be *idem* consistently with the record, which says that he was *alius*: and therefore such an averment, contrary to the record, is not to be admitted.

As to the diminution alleged, I shall make no difficulty after a verdict, of admitting even that there are no such writs at all.

Et per curiam, The case in *Rolle* is exactly in point, and according to the reason of the law in other cases: therefore the judgment must be affirmed.

Dominus Rex *vers.* Popplewell.

In conviction
for swearing
the oaths must
be set out.

CONVICTION for profane cursing and swearing was quashed, for want of the particular oaths and curses being set out.

Anonymous.

Mandamus.

STRANGE moved for a *mandamus* to be directed to the churchwardens of *St. Botolph Bishopsgate*, commanding them to call a vestry in *Easter* week, for the election of churchwardens: but the court refused it, saying there was no instance of such a *mandamus*, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed.

Dominus Rex *vers.* Betts et al'.

Amendment
on the crown
side.

TO a *scire facias* on the crown side upon a recognizance for keeping the peace, the defendant as to the breach assigned pleaded Not guilty, but concluded with an averment, instead of concluding to the country: and after a demurrer, I moved to amend the plea: and the court gave leave to amend it accordingly.

Dominus Rex *vers.* Pappineau.

What judgment
ought to
be entered on
a conviction
for a nuisance.

THIS was a writ of error directed to the justices of the peace of the county of *Surrey*, to remove a conviction for a nuisance upon an indictment setting forth that the defendant such a day, *Super quendam rivum sive aquae cursum ibidem vocat' Wandle prope adjacen' et contigue adjungen' communi altae viae Regiae ibidem vocat' Tooting-Lane, necnon prope separales domus mansionales diversorum ligeorum et subdit' dicti Domini Regis, erexit et aedificavit quendam molam depsere coria (Anglice to dress hides) et macerare cutes ovium in aqua (Anglice to steep sheep skins in water) et quod praed' (def') apud molam praed' depsuit et maceravit triginta cutes ovium magnum foetorem et insalubrem odorem emittentes, et easdem cutes in quodam loco ibidem prope communem altam viam Regiam praed' posuit et locavit, per quod aer ibidem maxime corrumpebatur et adhuc corruptus et infectus existit ad commune nocumentum, &c.*

After Not guilty pleaded a trial is had, and the defendant found guilty; upon which the judgment of the court is entered, that the defendant

defendant be fined 100 l. for the said nuisance, *et capiatur*, &c. Upon this judgment the general errors are assigned, and the coroner and attorney pleads *in nullo est erratum*.

Strange pro querente in errore argued, that this should be reversed. And his first objection was, that as it was laid, it was not a fact indictable, it not being laid to be *in* but *near* the highway, for the *per quod aer ibidem* must refer to the erection, which is laid to be upon a rivulet *near* the highway, and if it be not *in* the highway, an indictment will not lie. *Sed per curiam*, Surely this is well enough. If a man erects a nuisance *prope adjungen'* to the highway, *per quod* the air thereabouts is corrupted; it must in its nature be a nuisance to those who are in the highway, and therefore the indictment is well enough.

Then I went on to another objection, (and which I principally relied upon) that the judgment was erroneous for want of an adjudication that the nuisance be abated. The end of the law in giving an indictment for a publick nuisance is, to have the whole removed by one suit, and to avoid a multiplicity of actions. And it is preferred before an action upon the case, because in that each party can only recover his separate damages; whereas upon an indictment there may be an end of the thing at once. By these indictments the publick inconvenience is to be removed, which can be no other way effected, than by a judgment to abate the nuisance; for as to a fine, the publick is never the better for that, and a man in many cases may find it worth his while to pay a fine, and continue the nuisance, in which case the publick has no redress.

In the case of the *King v. Walcot*, which was an attainder for high treason, the words *ipso vivente* were omitted, and that was held a sufficient error to reverse that attainder; and yet that is not in so material a part as this; for there being a judgment that he should suffer death, (which is *extremum supplicium*) it was but an omission in the form; but the court said that the common law having made that part of the judgment, it was not in the power of the court to omit it: in this case the principal judgment that the law has appointed is, that the nuisance be abated, to which the court may add the further punishment of a fine; but unless they give judgment to abate the nuisance, the publick is no better for this prosecution, but there must be a multiplicity of actions, which it is against the policy of our law to admit, where it may be prevented. The interest of the publick is so great, that in *Salk.* 458. it is held, that for the concern of the publick an act of general pardon shall take away the fine, but not the abatement. And an indictment for a nuisance is not good, unless it concludes *ad commune nocumentum* of the

Salk. 632.
4 *Mod.* 395.
Cumb. 369.
Parl. Ca. 127.

the King's subjects: which shews that the removing the common nuisance is the chief end of the indictment.

There are few precedents to be found of these judgments entered at large. *Bro. Nuisance* 39. it is said how the judgment ought to be, which is an abatement and a fine; and in the *Old book of Entries* 144. *b.* in an affize of nuisance for diverting a watercourse the entry is, *quod nocumentum praed' amoveatur et trencha praed' obstruatur.*

And it is no objection to say, that this is an error for the advantage of the defendant. It was for *Walcot's* advantage to have that painful circumstance omitted, but the court would not take that into consideration, and held it ill, as varying from the judgment which the law had appointed. If upon an indictment for murder the defendant should have judgment to be whipt; will any body say this is a good judgment, and yet surely it is for the benefit of the defendant.

Fazakerley contra. Every judgment must be according to the circumstances of the case. This is not a permanent, but a transitory nuisance, in dipping of skins, and I do not know how that is to be abated: we may trust the court in setting such a fine as will be as effectual as an abatement: the defendant may have left off dipping his skins, and that is all the abatement the thing is capable of.

C. J. Regularly the judgment ought to be, to abate so much of the thing as makes it a nuisance. 9 *Co.* 53. *Godb.* 221. *Winch* 3. If a house be built too high, so much of it as is too high shall only be pulled down. The cases cited by Mr. *Strange* were of a permanent nuisance; but here erecting the mole is not the nuisance, (for it might be lawful to do that) but the nuisance arises from the use he puts it to. If a dye-house, or any stinking trade were indicted, you shall not pull down the house where the trade was carried on. I think here could be no judgment to abate any thing, and therefore the judgment must be affirmed.

To which *Powys J.* agreed. *Et per Fortescue J.* The question is, whether in the case of a publick nuisance it is not necessary to give two judgments in all cases. I am not satisfied this is not a permanent nuisance; the erecting is the cause of the nuisance, and the conclusion of the indictment *ad commune nocumentum* goes to the whole, as well the erection as the dipping. I remember the case of a glass-house, where the judgment was to abate the nuisance, not that the house should be pulled down, but only to prevent his using it again as such; which might have been done in this case, to prevent

vent his dipping skins again. *Co. Ent.* 92. b. 9 *Co. Batten's* case: it appears the plaintiff could not go on for damages after the defendant had abated the nuisance, which shews an abatement to be the most necessary part. 2 *Roll. Abr.* 84. And as no instance is given, where the judgment has varied in pursuance of the distinction now set up between permanent and transitory nuisances, I am of opinion that this judgment is erroneous, and ought to be reversed.

Reynolds J. I think the judgment is right. Every judgment should be adapted to the nature of the case: where the erection is the nuisance, there ought to be a demolition: roasting of coffee was formerly thought a nuisance, and yet no body ever imagined the house in which it was roasted should be pulled down: and what other way is there to abate such a nuisance? A glass-house is a nuisance in its own nature; but this is a lawful act, provided the skins which are dipt are not stinking skins. I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some stinking skins.

The Judges took further time to consider of it; and in *Trinity* term following it was mentioned again, and all standing to their former opinions, it was adjourned.

N. B. It was put in the paper about a year after, and no body appearing for the defendant, the judgment was affirmed.

Hasket *vers.* Strong. At the Rolls.

MR. *How* made a mortgage for 500 years, dated 9 June 1720. Third mortgagee buying in the first should be prior to the second. He afterwards made a mortgage in fee to the plaintiff; and *Neal* assigned to the defendant, who afterwards advancing more money took a conveyance of the inheritance, with an agreement that the term should be kept on foot as an additional security: the term was never assigned over to a third person. And on the question touching priority it was agreed, that if the term had been regularly kept on foot, the defendant would have been in the common case of a third mortgagee taking in the first incumbrance to protect himself, by which he would have had the law on his side; whereas here the term was merged upon the grant of the inheritance, and therefore at law it would be with the plaintiff, who had the first mortgage in fee. To which it was answered, and decreed by the court, that the plaintiff's conveyance of the inheritance interposing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor having

having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant must be first paid his whole money. *Strange pro defendente.*

Southerton vers. Whitlock.

At Guildhall coram Raymond C. J.

Infant bound
by promise of
payment at
full age.

IT was held, that if goods which are not necessities, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound: and he left it to the jury whether there was any confirmation of the contract at full age.

Lambell vers. Pretty John.

Error *coram*
vobis lies not
after affirm-
ance in Ex-
chequer
Chamber.
1 Roll. Abr.
755. pl. 16.

JUDGMENT was given in *B. R.* in trespass, and on error in the Exchequer Chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis in B. R.* which Mr. Parker moved to quash, and cited 1 *Ven.* 207. 2 *Lev.* 38. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

Belfield Serjeant insisted, the record never was removed from *B. R.* and that debt would still lie upon it. *Sed per curiam*, Before the statute of *Eliz.* we could not examine our own errors in fact after an affirmance in Parliament: and the Exchequer Chamber is now in the same degree with regard to us, as the Parliament was before. The writ of error must be quashed.

East-India Company vers. Pullen.

At Guildha coram Raymond C. J.

If I send my
servant with
the goods, the
carrier is not
liable.

ACTION against the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ship to the company's warehouses. Upon the evidence it appeared, the defendant was a common lighterman, and that it was the usage of the company on the unshipping of their goods to clap an officer, who is called a guardian, in the lighter, who as soon as the lading is taken in puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse. It appeared to be done so in this case, and part of the goods were lost.

The

The Chief Justice was of opinion, this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. He thought therefore the action was not maintainable, so the plaintiffs were nonsuited. *Strange pro quer'.*

Price vers. Brown.

At Guildhall coram Raymond C. J.

UPON payment after the day and before bringing the action, Evidence; it was pleaded to be a payment of the principal and all interest then due: on evidence it appeared a gross sum was paid, which upon computation did not amount to the full interest, but it was sworn that the plaintiff accepted it in full. I objected, that they ought to prove it as they had pleaded; but the Chief Justice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falsity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the single witness who swore to the payment of the money. But the court would grant no new trial, saying it would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before.

No new trial where party might have had evidence on first trial.

Chambers vers. Robinson.

IN an action for a malicious prosecution of an indictment for Evidence; perjury, the Chief Justice allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not (as he said) that the jury were to consider it in damages, but only as a circumstance of malice.

Upon the trial it appeared, the perjury was ill assigned, so that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without examination of any witnesses. But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones v. Gwynn*, where the distinction in *Salk. 13.* was denied, Salk. 15; and held by the whole court that the action would lie, though the indictment.

Action lies for malicious prosecution of a bad indictment.

indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him, but it serves no purpose of justice in bringing the party to punishment if he be guilty.

New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.

Whereupon the jury gave the plaintiff 1000*l.* damages, and the next term the defendant moved the court for their judgment upon this point, (which was saved at *nisi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the case of *Jones v. Gwynn*, and the defendant's counsel did not seem to think the reason and authority of that case was to be shaken.

Then the defendant moved for a new trial on account of the excessiveness of the damages; and the court said it was but reasonable he should try another jury, before he was finally charged with 1000*l.* So a new trial was granted upon payment of costs. And a new trial being had, the same damages were given again; upon which the defendant applied to the court, who said it was not in their power to grant a third trial; and so is *Salk.* 649. the case of *Clerk v. Udal*.

Easter

Easter Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

James Reynolds, Esq;

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

Lorymer vers. Hollister.

THE bailiff, who had a writ against the defendant, came to Mr. *Stapleton* an attorney, and told him the defendant desired he would back the writ, and appear for him; and afterwards upon the plaintiff's attorney's applying to him, he told him he had sent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and signed judgment for want of a plea. Upon motion to set it aside, it appeared the bailiff went of his own accord to Mr. *Stapleton*, without the direction of the defendant, and that Mr. *Stapleton* discovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refused to set it aside, and said they would oblige Mr. *Stapleton* to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange pro quer'.*

Where an attorney undertakes to appear, the court will oblige him to do it in all events.

Noke *vers.* Windham.

Practice.

THE lessor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be answerable for costs.

Eden *vers.* Wills.

The *scire facias* in error must be returnable as the original process was. L. Raym. 1417.

AN action was commenced in C. B. by writ of privilege, which was returnable at a day certain: after judgment for the plaintiff a writ of error was brought, and a *scire facias quare executio non* was taken out, returnable at a general return. And upon motion to set it aside, the matter was stirred several times. And after consideration and search of precedents, the *scire facias* was set aside, for that it ought to pursue the nature of the first process: and whereas in the common case of actions by original in C. B. the process upon error in B. R. must pursue that, and be returnable at a general return; so where the proceeding below is by attachment of privilege, which is returnable at a day certain, the proceedings here must be returnable in the same manner. And a case was cited of *Vavasour v. Parker*, Trin. 11 Ann. where it was so ruled. *Thef. Bre.* 121. The writ was quashed, but without costs.

Courtney *vers.* Satchwell.

An immaterial traverse must be shewn for cause of demurrer.

IN trespass, assault, and false imprisonment, the defendant justifies under a process out of the sheriff's court in London, *quae est eadem*, &c. and traverses being guilty *aliter vel alio modo*: to this the plaintiff demurs, and shews for cause, that the traverse is idle, and unnecessary. And upon argument the court were of opinion, that this was ill on a special demurrer, the *quae est eadem* being a sufficient traverse. *Lutw.* 1457. And so it was held in the case of *Carvil v. Manby*, where on a general demurrer it was allowed to be well enough; but the court said if it had been a special demurrer, it would have been otherwise. *Judicium pro querente.*

Lifter

Lifter *vers.* Baxter.

LISTER being master of a ship that was in distress at sea, put in at *Amsterdam*, and there borrowed 60*l.* of *Baxter* to repair the ship, and hypothecated it for repayment of the money. The money not being paid, *B.* libelled in the admiralty; whereupon a prohibition was moved for, on account of it's being a contract at land; and it not appearing by the words of the contract, that the ship was upon her voyage, it would be presumed she was only to begin her voyage from *Amsterdam*.

The master cannot hypothecate the ship before the voyage begins.

But the court was clearly of opinion, there should go no prohibition; it appearing by the libel, that the ship was upon her voyage; and if she was not, it might be pleaded below, which would oust the admiralty court of jurisdiction; the master having no power to hypothecate the ship in port, before she set out upon her voyage.

Sir Thomas Hales *vers.* Taylor.

THE plaintiff having brought an action against the defendant for diverting his water, the matter was referred to arbitration, and the arbitrators awarded the defendant to fill up a canal, restore the stream to its former course, and to do several other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read several affidavits to prove it. The defendant on the other side read affidavits, to prove his compliance with the directions of the award. Whereupon the court said, it was discretionary whether they should enforce the award by an attachment; and there being a contrariety of evidence, they would not determine it by affidavits, since the plaintiff was not without another remedy, by action upon the award.

Executing an award by process of contempt is discretionary.

Sullivan *vers.* Seagrave.

ERROR of a judgment in ejectment in *B. R.* in *Ireland* *de parte domus cognit' per nomen de le Three Kings in A.* And it was objected, that an ejectment would not lie *de parte domus*, and that the sheriff could not know of what part he was to deliver possession, and 2 *Roll. Rep.* 483. 11 *Co. Savil's case.* 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March* 97. *Salk.* 254. were cited.

Ejectment lies *de parte domus*.

But the court was of opinion, it was well enough, the situation of the house being sufficiently described, and the same certainty is never required in an ejectment as in a *præcipe*.

Then exception was taken, that the record was not well returned; the writ of error being directed to *William Witsbed* Chief Justice, and the return is only by *William Witsbed* without adding *capital' justic' infra nominat'*, which *Fortescue* Justice, thought a material objection, and mentioned the case of the *Queen* *vers.* *Somers 7 Annæ*, which was a *certiorari* directed to the justices of the peace of *Oxon*, and the return was by two aldermen, without naming themselves justices. *Sed per C. J. and Reynolds J. (absente Powys J.)* Here are the words *prout interius mihi præcipitur*, which are enough to shew him to be the same person to whom the writ is directed: So the record being well removed, the judgment must be affirmed.

Case of the Borough of Christ-Church.

No trial at bar
before issue
joined.

UPON a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined: And the court refused to grant it, saying it was below the dignity of the court to do it, till they knew whether the issue joined would be a matter of difficulty or not.

Anonymous.

Mandamus.

A *Mandamus* was granted on Serjeant *Pengelly's* motion, to swear in a director of the Amicable assurance, which is a company created by charter from the crown.

Ludwell *vers.* Hole.

Words not
actionable.
L. Raym.
1417.

AFTER verdict for the plaintiff, who laid himself to be a gentleman, in an action for these words, '*You are a cheating old rogue, and have cheated the fatherless and widow*'. The judgment was arrested for want of shewing the defendant to be a trader, or laying any *colloquium* of his trade. 5 *Mod.* 398. 1 *Rel. Ab.* 62. *Hardr.* 8. *Raym.* 62, 169.

Vat qui tam *vers.* Green.

IN a *qui tam* on the statute of usury, I moved to stay proceedings, Practice. till notice given of the plaintiff's place of abode: After the rule was served on the plaintiff's attorney, he sends notice in writing that the plaintiff was in *Switzerland*, and was going on with the action: Upon which I moved a second time to stay proceedings, till the plaintiff's return from *Switzerland*, or security given for the costs, which is the reason the common rule is founded upon: And after hearing Mr. *Hussey* for the plaintiff, the court made a rule according to my motion, and security was given for costs.

Rig *vers.* Wilmer.

ACTION by the plaintiff as assignee under a commission of Assignee of a bankruptcy; and the declaration was, that the defendant was commission indebted to the bankrupt, and being so indebted he promised to pay may declare to the bankrupt; but throughout the whole declaration there was on a promise no *assumpsit* to the plaintiff the assignee. to the bankrupt.

On demurrer it was insisted on by the defendant, that the statute had transferred the promise to the assignee, and that a promise before made to the bankrupt was afterwards in point of law a promise to the assignee, and ought to have been declared on as such.

Sed per Curiam, What reason is there to differ this from the common case of an action by an executor where you always declare on a promise to the testator, and yet the promise is as strongly transferred to the executor, as it is here to the assignee. Judgment for the plaintiff.

Foot *vers.* Prowse. *Ante* 625.

THE judgment of the Exchequer Chamber, whereby the A peremptory judgment given in *B. R. pro defendente* was reversed, being mandamus now affirmed in parliament, the plaintiff came and moved for a may go before peremptory *mandamus*: insisting, that he had now falsified the any formal return, and consequently set aside the defendant's excuse. To judgment. which it was objected, that no peremptory *mandamus* ought to go, unless besides the reversal of the judgment given for the defendant there had been also a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon

some judgment establishing the party's right that applies for it.
 Salk. 428. *Parl. Ca. Philips v. Bury.* Salk. 431. 2 Cro. 206. *Yelv.* 74.
 2 Vent. 295. *Pasf.* 10 Ann. *Lidd v. Rodd,* Trin. 7 Ann. *Hicks*
v. Sherburn.

To which it was answered, that here was every thing done by the plaintiff that was possible for him to do, for he can have no new judgment, the Exchequer Chamber and House of Lords being confined only to reverse or affirm.

And the whole court were of opinion, that a peremptory *mandamus* ought to go; for this was not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants, when they are satisfied of the parties right: The reversal of our judgment is declaring the opinion of the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamus's* on producing the *possea*; which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Dominus Rex *versf.* Inhabitantes de Leofield.

Poor.

AN order of removal whereby J. S. was adjudged *likely to become chargeable*, without saying *to the parish from whence removed*, was confirmed.

Dominus Rex *versf.* Warre et al'.

Caption *ad festum Epiphani* ill.

UPON demurrer to an indictment, the caption appeared to be, at a sessions held *ad festum Epiphani* instead of *Epiphaniae*: and it was insisted *pro defendente*, that this was a different time from that prescribed in the statute, for *Epiphanius* is in the *Roman* calendar, and was a bishop of *Salamis* in the time of the Emperor *Theodosius*: and the court held it ill, and gave judgment for the defendant.

Mr. Delamotte's case.

No writ of privilege against a justice's being constable.
 13 & 14
 Car. 2. c. 12.
 §. 15.

HE was a justice of peace in *Kent*, and lived at *Black-beath* and in *London*. And being appointed constable in *London*, Serjeant *Cbeshyre* moved for a writ of privilege, and cited *Cro. Car.* 585. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute *Car. 2.* to apply to the sessions.

Sifney *vers.* Nevinfon.

THE plaintiff had brought an action of debt upon a bond ^{Costs.} against the defendant as administratrix; and filed a bill in equity to discover assets; and had instituted a suit in the spiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought *in B. R.* and the judgment reversed: then the plaintiff brought a new action *in B. R.* And the defendant moved to stay proceedings, upon the act for amendment of the law, on paying principal, interest and costs. And now upon motion for the court's direction to the master in taxing the costs, it was insisted for the plaintiff, that the defendant ought to pay the whole costs of the first suit, the proceedings in Chancery, and the spiritual court: and the case of *Merril v. Jocelyn*, *Trin 13 Ann.* was mentioned for this purpose.

Sed per cur', We have nothing to do to order costs for proceedings in another court, which has a power to award costs, if the party is intitled to them; and as to the judgment, that is reversed, there is no reason why the defendant should pay for the error and mistake of the plaintiff. We are of opinion, the proceedings in this cause must be stayed on payment of the costs of this suit.

Dominus Rex *vers.* How.

INDICTMENT against the defendant, for that he *quendam* ^{Indictment for words must specify what they were.} *Nich'um Carew, Baronettum*, being a justice of peace in the execution of his office, *per diversa scandalosa, minacia et contemptuosa verba abusus fuit, et ipsum in executione officii sui praedicti vi et armis illicite retardavit.* Upon demurrer to this indictment, it was ^{Vide the resolution in Dr. Sacheverel's case.} objected by Serjeant *Darnall*, that it was too general, and that the words ought to be set out, that the court may judge whether they are indictable or not, according to the late cases of convictions for cursing and swearing, where the court has required the oaths to be set out.

Strange contra admitted the indictment to be bad as to the words, ^{Indictment too general.} but insisted that it was good as to the obstructing the justice in the execution of his office: and if any part of it be well laid, there shall be judgment for the King. Justices are indictable for neglecting their duty, and it is but reasonable to give them the same remedy against the obstructers. *Salk. 380.*

Et

Et per curiam, If any part of the indictment was good, we should not give judgment for the defendant. But this is bad *in toto*. *Retardavit* will hardly warrant calling this an obstruction; but if it would, surely some act or other should be set out. *Judicium pro defendente*.

The King *against* the Inhabitants of Saint Mary the Virgin in Marlborough.

Order,

AN order was made upon the 43 *Eliz.* for a neighbouring parish to contribute *so long as we the said justices shall think fit*. *Et per curiam*, It must be quashed, for the discretion that is left in the justices is, as to the *quantum*, and not as to the duration of the contribution.

Dominus Rex *vers.* Travers.

At Kingston Assizes Lent 1726. coram Raymond C. J. de B. R.

What age the law will allow an infant to be a witness at.

THE defendant was indicted the last summer Assizes, for a rape upon the body of a child, then little more than six years old. And because the Lord Chief Baron *Gilbert* refused to admit the child as an evidence against him, he was acquitted.

But at the same Assizes an indictment was found against him for an assault with an intent to ravish the said child. And this indictment coming now to be tried before *Raymond C. J.* the same objection was now taken by *Comyns* and *Darnall* Serjeants, *viz.* that the girl being now but seven years of age, could not be a witness: they insisted that it had formerly been held, that none under twelve years of age could be admitted to be a witness, and said that a child of six or seven years of age, in point of reason and understanding, ought to be considered as a lunatick or madman.

On the other side it was said, that in capital cases, which concerned life, this objection might be allowed; but in cases of misdemeanor only, as this was, such a witness might be admitted: they insisted, that the objection went only to the credit of the witness; and *Hale's P. C.* says, that the examination of one of the age of nine years has been admitted: and a case at the *Old Bailey* 1698. was cited, where upon such an indictment as this, *Ward* Chief Baron admitted one to be a witness, who was under the age of ten years,

years, after the child had been examined about the nature of an oath, and had given a reasonable account of it.

But *Raymond C. J.* held, that there was no difference betwixt offences capital and lesser offences, in this respect. And that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the *Old Bailey* in 1704. this point was thoroughly debated in the case of one *Steward*, who was indicted upon two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against *Steward* was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inquiring into any circumstances to give it credit. And it was merely upon the authority of *Hale's P. C.* where it is said, that a child of ten years of age may be a witness, that the other child of that age was admitted to be a witness in the first indictment. And in the present case, the child was refused to be admitted a witness. And there not being evidence sufficient without her, the defendant was acquitted.

Bredon qui tam *vers.* Harman.

At Guildhall coram Eyre C. J. de C. B.

ACTION *qui tam* for not registering articles of apprenticeship according to the stamp act: the defendant pleaded *nil debet*: and upon the trial he offered in evidence a record of a recovery against him for the same forfeiture by another person, and so endeavoured to discharge himself by this under the plea of *nil debet*. And it was insisted for him, that if it appeared, that there was a recovery against him by another person for the same forfeiture, he was thereby discharged against all men, and owed nothing upon that account, and therefore it was very proper to give this record in evidence upon *nil debet*.

A former recovery not to be given in evidence on *nil debet* in a *qui tam*. Strange *pro quer*.

But *Eyre C. J.* denied this record to be given in evidence, and said the defendant ought to have pleaded it, if he would take advantage of it; for if it had been pleaded, the plaintiff would have been at liberty to have replied *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he could not be prepared to shew upon this issue.

Dominus Rex vers. Brotherton.

Selling meat
on a Sunday
no offence at
common law.

INDICTMENT for exercising the trade of a butcher on a Sunday. And exception was taken, that it was not laid to be *contra formam statuti*, and it was no offence at common law. But the court refused to quash it, and put the defendant to demur; and afterwards upon demurrer judgment was given for the defendant.

Trinity

Trinity Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } Justices.

James Reynolds, Esq;

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

Dominus Rex vers. Rhodes.

THE defendant exhibited a will in *Doctors Commons* as executor, and demanded probate: after a long contest there, it was determined in favour of the will; and upon appeal to the Delegates the sentence was confirmed.

Pending a suit in the spiritual court touching the validity of a will, an indictment for forging it ought not to be tried.

Afterwards the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged, and upon full affidavits of the forgery a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the Lords Justices; and an indictment was also found for the forgery, and stood ready for trial in *B. R.* Upon motion for a *habeas corpus ad testificandum* the Chief Justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed.

Dominus Rex *vers.* Davie.

Apprentice
not to be dis-
charged with-
out a reason.

ORDER of sessions for discharging an apprentice was quashed, the only reason given for the discharge being, that the master declared in open court he would not take him again.

It was agreed to be a point not now to be disputed, but that the sessions had an original jurisdiction to discharge apprentices.

Dominus Rex *vers.* Smith.

Nuisance.

THE defendant was convicted on an indictment, for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nuisance, and fined the defendant 5 *l*.

Dominus Rex *vers.* Lewis.

Certiorari lies
to *Wales* on
indictments
for misdemea-
nor.

INDICTMENT in the grand sessions of *Anglesea*, for em-bracery. And it was moved *ex parte def* for a *certiorari*. It was admitted, that in capital cases the *certiorari* lay by the 26 *H. 8. c. 6. §. 6.* But it was contended for the prosecutor, that in cases of misdemeanor it had never been granted; of which the court would advise. And at another day several precedents were produced, and *postea*, where the indictment removed from the grand sessions had been sent down to be tried in an *English* county, and returned up to *B. R.* therefore in this case there being an affidavit, to induce a suspicion, that a fair trial could not be had in *Wales*, a *certiorari* was granted.

How affidavits
must be inti-
tled.

N. B. The affidavit was intituled *Rex v. Lewis*. And it was objected there was no such cause in this court. But the court said it was enough that there was a cause below between the *King* and *Lewis*, so the affidavit was read. At another day *inter*

Regem *et* Jones.

THE affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits *pro def* on shewing cause were intituled. *Rex v. Jones*. And upon objection to the reading them, the court said, that there being a rule

in *B. R.* to shew cause why there should not be an information, that was a proceeding in court between the *King* and *Jones*, and warranted the intitling the affidavits in that manner.

Onslow *vers.* Booth.

A Plea of privilege of clerk to a prothonotary in *C. B.* was set aside, the affidavit annexed to it being *that this is a true plea*, and not *that the plea is true*, the statute requiring the affidavit should establish the fact, and not the legality of the plea. Plea of privilege set aside.

Braceby *vers.* Dalton.

IN an action upon the case Mr. *Wynne* moved on affidavit that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refused it, saying it had never been done but in a *qui tam*. Practice.

Powel *vers.* Gay.

IT was settled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time; he shall have so many days to plead after the rules are out, as he demanded *oyer* before the rules were out. Practice.

Frontin *vers.* Small.

IN covenant, the plaintiff declares, that by deed made between her as attorney for *James Frontin* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted to pay the yearly rent of 60 *l.* to *James Frontin*, and then assigns a breach in non-payment of rent, *ad damnum* of the plaintiff, who was the attorney. Where a warrant of attorney is given to execute a deed, it must be executed in the name of the principal.
L. Raym.
1418.

Demurrer inde, and *Strange pro defendente* objected, that this is a void lease, and that no action can be maintained upon it, especially by the plaintiff who was but the attorney, and to whom the rent is not reserved: neither is it so much as a covenant *with the plaintiff*, but only generally *quod convenit* to pay the rent to *James Frontin*. The power is not pursued by a lease in the name of the

attorney, for it ought to have been in the name of the principal. 9 Co. 76, 77. *Combe's case* is express, "If attornies have power to make leases by indenture for years, they cannot make the indentures in their own names, but in the name of him who gave the warrant of attorney;" and 1 Roll. Abr. 330, 501. Godb. 389. Mo. 71. it is said such leases are void. A warrant of attorney in the nature of it is only giving another a power to set my name in my absence, but not to enable him to act as owner of the estate.

Reeve contra insisted, that the agreement that one shall procure an entry and enjoyment, and the other shall pay the rent, may be good, though the deed be void so as to pass an interest in the land: and the word *dimisit* is a covenant, upon which an action will lie. 4 Co. *Noaks's case*. And a lease may be good reserving rent to a stranger, who is no party to the deed; and so is 1 Mod. 113. *Et per curiam*, No doubt but in a good lease the rent may be so reserved, and that *dimisit* will amount to a covenant; but then that must be where the deed is valid, as this is not: and if on the one hand it be void so as to pass an interest in the land, it is but just on the other hand that it should be void as to the reservation of rent: especially in this case, where the covenant is not *with the plaintiff*, nor the rent reserved to her. Judgment for the defendant.

Chadwick *vers.* Allen.

What a regular note.

UPON demurrer to a declaration on the following note, it was held to be a note within the statute; "I do acknowledge that Sir *Andrew Chadwick* has delivered me all the bonds and notes for which 400 l. were paid him on account of colonel *Synge*, and that Sir *Andrew* delivered me major *Graham's* receipt and bill on me for 10 l. which 10 l. and 15 l. 5 s. ballance due to Sir *Andrew*, I am still indebted, and do promise to pay. *Judicium pro quer.* *Strange pro defendente.*

Manwairing *vers.* Sands.

In Middlesex coram Raymond C. J. de B. R.

Husband not chargeable for goods sold to adulterous wife. Salk. 116.

IN an action against the husband for a laced head sold to the wife; it was proved, that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him herself: the Chief Justice held the defendant not chargeable, and said he should have ruled

ruled it so, if there had been no actual notice, which only strengthened the case. *Strange pro defendente.*

Pepys vers. Sir John Lambert.

At Guildhall coram Raymond C. J.

THE third indorsee of a promissory note kept it from the first of November to the seventh of January without receiving it of the maker of the note: and in an action against the first indorsee, without notice, the plaintiff was nonsuited for his neglect. *Strange pro querente.* Within what time a note ought to be demanded.

Dominus Rex vers. Edwards.

INDICTMENT for conspiring to marry a poor person settled in *A.* to a person settled in *B.* in order to bring a charge upon the parish of *B.* And on demurrer *judicium pro defendente*, because not an offence indictable. *Vide Salk. 174.* Indictment *est ne gift.*

Wheeler vers. Thompson.

ON a motion for a prohibition, it was held that a carpenter may sue for wages in the Admiralty. *2 Ven. 181. Salk. 33. 1 Mod. 93.* Carpenter may sue in the Admiralty.

Jenkins vers. Purcel.

At Guildhall coram Raymond C. J.

WHILST the jury were swearing, the defendant's counsel called for the record, and finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit, and to save the costs, refused to pray a *tales*; and though twelve had been sworn, yet there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors. Practice at *nisi prius.*

Turner *vers.* Turner.

In Canc. coram King Chancellor, 14th of May.

Infant pays
no costs on
a bill filed by
the *prochein*
amy.
2 Will. Rep.
297.

THE plaintiff being an infant, brings a bill in this court, by his *prochein amy*, to discover whether a will was cancelled by the defendant after the death of the testator, or by the testator himself. And upon the hearing, the court directed an issue at law, to try this point, and upon the trial of that issue, a verdict was found for the defendant.

Upon the day of trial of this cause the *prochein amy* dies, and within a short time afterwards the infant comes of age, but does not proceed any further in the suit.

The defendant brings on the cause upon the equity reserved, and the plaintiff's bill was dismissed with costs.

Upon which the plaintiff obtained a rehearing as to the point of costs. And for the plaintiff it was argued by *Talbot* and *Cowper*, that any person might bring a bill in this court in the name of an infant, which the infant could not discover whilst under age: that it would therefore be very hard to make an infant pay costs in a suit which might be commenced without his consent; and that it had never been the practice, unless the infant avowed the suit after he came of age, which made it his own act.

That the *prochein amy* was the person only relied upon for costs; and if at any time it appeared to the court, that he was not responsible for this purpose, the court upon motion would order a new one to be named, that was so: and in cases where it is necessary to examine the *prochein amy* as a witness in the cause, it can never be done till he is discharged from being *prochein amy*, and a new one named; because of his interest in the cause, in being subject to costs.

That they could not find one instance, where an infant under these circumstances ever paid costs: that they had searched the *subpoena* office, and found, that wherever an infant's bill was dismissed with costs generally, that the *subpoena* for costs was always made out against the *prochein amy*; from whence they argued, that the practice was to make him only liable.

A *feme covert* when she sues by *prochein amy* may be subject to costs, but an infant is not; for a *feme covert* may at any time disavow the suit, which an infant cannot: and this they said was the distinction; and therefore insisted, that the plaintiff, in regard he had not prosecuted the suit after he attained his full age, should not be made subject to costs.

For the defendant it was argued by *Lutwyche* and *Mead*, that the infant and *prochein amy* were both liable, and ought to be so, otherwise the infant might be as vexatious as he pleased: at common law the judgment is always entered against the infant, and the execution follows the judgment; so that at law the infant here is liable to costs; and there being in this case both costs at law and in equity, a court of equity will not in such cases take from the defendant the remedy he has at law. It was admitted, that they knew of no precedent in this court, where the infant paid costs; and therefore they would argue from cases at law, which they said were equally founded upon reason as cases in equity: and the reason of the common law in subjecting infants to costs, was in respect of their interest in the matters in controversy. The *prochein amy* has not an absolute power to carry on a suit without an infant's consent; for upon application to the court on the behalf of the infant, suggesting that the suit is not for his benefit, the court will refer it to a master, and if he reports it so, the court will stop the suit. The case of lord *Dudley* was mentioned, where an infant would have controverted an account before a master; but the court would not permit him to do it, till he had given security to answer costs; from which it was inferred, that an infant ought to be made liable to answer costs.

King Lord Chancellor, At common law no costs were given either to plaintiff or defendant: but the plaintiff found pledges *de prosequendo*, and in case it was found against him, he was amerced *pro falso clamore suo*.

Infants found no pledges at common law. The statute of *Gloucester* was the first statute which gave costs to demandants in real actions, and the power for infants to sue by *prochein amy* was first introduced by the statute of *Westminster 2*. It was made general, and *Coke* in his commentary upon these statutes says, that both guardian and *prochein amy* ought to be admitted by the court, and that no one can have a testamentary guardian for this purpose. I think it a proper power lodged in the court, that they may have responsible persons; for at common law, if the guardian lost the infant's land by mispleading, the infant could not falsify the judgment;

ment; but a writ of deceit lay to recover in damages against the guardian. I do not find that any case has been cited, where an infant plaintiff has been obliged to pay costs either at law or in equity: and in *Cro. Eliz.* 33. *Grave v. Grave*, an infant brought trespass by guardian, and was nonsuited; yet the court would not charge him with costs. And in another case 1 *Bulst.* 109. the court seemed to be of the same opinion.

And the chancellor having enquired, what was the practice, of the register, who said he had never known an infant liable in that court; he dismissed the bill without costs in equity; but left the defendant to recover at law, as he could.

Keilway *vers.* Keilway.

Coram King Chancellor 19 May 1726.

How the estate shall be distributed where there is a wife, a mother and brothers, but no children.
2 Will. Rep. 344.

R. *Keilway* died intestate possessed of a considerable personal estate, and without issue, leaving a wife, and several brothers and sisters, and his mother living.

The wife under the statute of *Car. 2.* takes a moiety; and a question arising upon the statute 1 *Jac. 2. c. 17.* how the other moiety should be distributed, whether the mother should have the whole, or only a distributary share with the brothers and sisters, and to have the opinion of the court, a bill was brought; and upon hearing the Lord Chancellor was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety in common with the brothers and sisters of the intestate.

Hill *vers.* Bateman & al'.

Coram Raymond, Chief Justice, at Westminster.

Action lies against a justice for committing where there was no attempt to distrain first.

THE defendant *Bateman*, being a justice of peace, had convicted the plaintiff for destroying game, and though (as it was proved) the plaintiff had effects of his own which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods: and an action of trespass and false imprisonment being brought against *Bateman* for this commitment, the Chief Justice was of opinion, that the action well lay.

The other defendant was the constable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a sufficient justification, it being in a matter within the jurisdiction of the justice of peace: but if a justice of peace makes a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to a constable. See 24 Geo. 2. c. 44.

And it was agreed, that where actions of this kind are brought against justices of peace, they are obliged to shew the regularity of their convictions; and the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court. In these actions justices must shew the regular proceedings.

Dominus Rex vers. Chipp.

THE defendant was convicted upon the statute 4 & 5 W. & M. c. 23. for destroying game; not being a person duly qualified. Conviction for game.

Filmer for the defendant took several exceptions to the conviction.

1. That the information, which was set forth in the conviction, was insufficient to warrant the conviction; for the information only recited that he was an *inferior tradesman*, but did not shew that he had *wasted his substance*, or that he was a *dissolute person*, which are the words of the statute; and therefore it did not appear by this conviction, that the defendant was such a person as was intended by the statute, for he might be an *inferior tradesman*, and yet have a sufficient estate to qualify him to hunt, &c.

2. That it was not any where set forth in the conviction, that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful.

3. That the conviction set forth, that information was given to such an one *justice of peace*, but did not say *ad tunc* a justice; and he might be a justice at present, and not at the time of the information.

But the court over-ruled all the exceptions; and to the first they said, that the statute was in the disjunctive, *viz. inferior tradesman or dissolute person*; and therefore saying that the defendant was either was sufficient.

To

To the second, the court said, that the statutes forbid such persons as the defendant to *hunt at all*, and made it criminal for such persons to *hunt* generally. And in this statute there is no distinction betwixt *lawful* and *unlawful hunting*, as there is in the statute against deer stealers; and they agreed, that in a conviction for deer stealing, it must be set forth, that the defendant did *unlawfully hunt*; but in the present case it need not, because there is no such distinction.

To the third exception the court said, that the conviction set forth, that information was made to such an one *existen' un' justic'*, &c. which must be intended, that he was one at that time, and was sufficient without saying *adtunc*.

And so all the exceptions were over-ruled, and the conviction confirmed.

Dawson et ux' vers. Myer Mil'.

In the Exchequer Chamber.

What are
mutual cove-
nants.

A Writ of error was brought in the Exchequer Chamber upon a judgment in *B. R.* in an action of covenant, in which the plaintiff declared, that in consideration of 730*l.* 10*s.* to be paid by the defendant, he (the plaintiff) covenanted on or before the 25 *March* then next, to transfer the produce of 634*l.* 7*s.* 6*d.* in lottery annuities subscribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff set forth, that the company allowed 173*l.* 16*s.* stock upon the said annuities, and then sets forth, that he made a tender thereof to the defendant upon the day, and that the defendant refused to accept.

The defendant pleaded double, *viz.* that there was no tender, and that the contract was not registred. The plaintiff replied that the contract was duly registred, and offered an issue, to which the defendant demurred; and as to the defendant's plea that the plaintiff made no tender, the plaintiff demurred.

And upon joinder in demurrer, the court of *B. R.* gave judgment for the plaintiff; for they said, that there were mutual covenants, *viz.* an express covenant from the defendant to pay the plaintiff 730*l.* 10*s.* and then a distinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that the tender was out of the case,

case, and the plaintiff was not obliged to answer it; for if the plaintiff did not tender, the defendant had his remedy against him for not doing it.

A writ of error being now brought upon this judgment in the Exchequer Chamber, *Eyre* Chief Justice of the Common Pleas, *Gilbert* Chief Baron, *Price*, *Page* and *Hale*, Barons, and *Denton* Justice, were unanimously of opinion, that the judgment of *B. R.* was right, and they affirmed it accordingly.

Fazakerley was of counsel for the plaintiff in error, but he not attending there was no argument.

And *Strange*, who was ready to argue it for the defendant in error, only opened the case, because the court were clearly of opinion for his client upon the first opening. But the cases upon which he relied as authorities were these.

Blackwell v. Nash, Mich. 9 Geo. ante 535. which was a covenant by the plaintiff to transfer stock to the defendant, and the defendant *in consideratione praemissor* covenanted to accept and pay for it; and the court held that the words *in consideratione praemissor* implied the covenant on the other side to transfer; and were held to be mutual covenants, and judgment *pro quer*, which was affirmed in the Exchequer Chamber. 1 Saund. 319. *Pordage v. Cole*.

The case of *Wyvil v. Stapleton*, ante 615. which was affirmed in the House of Lords, was to pay *proinde adtunc* at the time of the tender; which is different from this case, for here the defendant's covenant is, to pay so much absolutely in satisfaction for the stock. The defendant here covenants to do two distinct acts, 1. to accept; 2. to pay; here is no *proinde*; and the words *in consideratione praemissor* relate only to the covenant on the other side to transfer, and not to the actual transferring.

If the covenant of the defendant *ad idem tempus solvere* is to be confined to his acceptance, then it gives him the liberty of avoiding one contract by the breach of the other. In the case of *Wyvil v. Stapleton* there were not the words *ad idem tempus*, and those words in the present case are to be construed to be the time the defendant agreed to accept the stock, and not the time the plaintiff does actually transfer.

He had another exception to the defendant's plea, which was this: by the contract the plaintiff was to transfer the produce of the

faid annuities, with all dividends, profits, &c. and the plea only offers an issue as to the produce of the stock. So that it is putting that in issue, which if found for the plaintiff, will not establish the performance of the whole agreement on his part. This was as immaterial as the case of payment before the day; which has been often held ill, if found for the plaintiff. *Trin. 13 Ann. B. R. Merril v. Jocelyn.* So in *Hob. 113.* in debt upon an obligation for the payment of 10 l. 10 s. the defendant pleaded payment of 10 l. only, upon which they were at issue, and a repleader was awarded, though the defendant had pleaded that he paid it *secundum formam conditionis*. But this exception did not come before the court for their opinion; and judgment was affirmed upon the first point.

Upon which affirmance a writ of error was brought returnable in Parliament, where after the case was settled, and I was ready to argue it, the plaintiff in error submitted, and paid the money.



END of the FIRST VOLUME.

